

1
2
3
4
5
6
7
8
9
10
11
12
13
14

**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

LARSON BEACH NEIGHBORS and JEANIE
WAGENMAN,

Petitioner(s),

v.

STEVENS COUNTY,

Respondent(s).

Case No. 07-1-0013

FINAL DECISION AND ORDER

15
16
17
18
19
20
21
22
23
24
25
26

I. SYNOPSIS

Petitioners Larson Beach Neighbors and Jeanie Wagenman (collectively, Petitioners) filed a Petition for Review (PFR) challenging Stevens County Ordinance No. 2007-01 Development Regulations Title 3, and alleging non-compliance with various provisions of the Growth Management Act (GMA), RCW 36.70A, and the State Environmental Policy Act (SEPA), RCW 43.21C. The Petitioners' raised 12 Legal Issues contending the County violated the GMA and, following mediation efforts by both Parties, Legal Issues. 1, 2, 3, 6, 7, and 12 were abandoned.

In summary, the Petitioners alleged that Stevens County Ordinance 2007-01, which adopted the Title 3 Development Regulations (DR), does not comply with the requirements of the GMA relating to assuring Capital Facilities Concurrency, protecting Critical Areas and Natural Resource Lands (NRL), and preserving Rural Character. In addition, the Petitioners

1 alleged Stevens County failed to adequately analyze environmental impacts as required by
2 SEPA.

3 With this Final Decision and Order, the Board concluded the Petitioners failed to carry
4 their burden of proof in regards to Legal Issue 4, Capital Facilities Concurrency, and Legal
5 Issues 9 and 11, as those issues related to Natural Resource Lands. The Board also
6 dismissed the Petitioners' SEPA claims - Legal Issue 10 - because the Petitioners failed to
7 exhaust their available administrative remedies prior to raising the issue before the Board.
8 As for assertions raised in Legal Issues 5, 8, and 11 regarding rural character and the
9 protection of surface and ground water, the Board found the Petitioners failed to carry their
10 burden of proof in demonstrating the County's actions were clearly erroneous and violated
11 the GMA. As for Legal Issues 5, 8, and 11, in regard to the protection of critical areas, the
12 Board concluded the County's Shoreline Master Program (SMP) is the regulatory mechanism
13 to provide protection of those critical areas that lie within the shoreline jurisdiction but the
14 County's Critical Areas Ordinance (CAO) is not the only development regulation for which
15 critical areas derive protection. Title 3, which sets forth design and development standards
16 serves an ancillary purpose and amplifies the protection measures set forth in the CAO.
17 Therefore, the Board remands specific sections of Title 3, as adopted by Ordinance 2007-
18 01, for the County to take legislative action specifically in regards to the consideration of
19 impervious coverage and stormwater management.

18 **II. INVALIDITY**

19 The Board determined there was not a basis for a finding of Invalidity.

20 **III. PROCEDURAL HISTORY**

21 On September 10, 2007, LARSON BEACH NEIGHBORS and JEANIE WAGENMAN
22 (collectively, Petitioners), by and through their representative, Jeanie Wagenman, filed a
23 Petition for Review (PFR). The PFR challenged Stevens County's (County or Respondent)
24 adoption of Resolution 2007-01 which adopted Title 3, the County's Development
25 Regulations (DR). The Petitioners allege various violations of the Growth Management Act
26 (GMA), RCW 36.70A, and the State Environmental Policy Act (SEPA), RCW 43.21C.

1 On October 10, 2007, the Board held a telephonic Prehearing conference to review
2 legal issues, the case schedule, and other procedural matters. Present were, Joyce Mulliken,
3 Presiding Officer, and Board Members Dennis Dellwo and John Roskelley. Present for
4 Petitioners was Jeanie Wagenman and for Respondent were Peter Scott and Clay White. At
5 the Prehearing conference, Stevens County objected to the Petitioners' issues, contending
6 they were too broad and open-ended. The Board noted the objection and permitted the
7 Petitioners to clarify the issues and submit an Amended Statement of the Issues.

8 On October 15, 2007, the Board issued its Prehearing Order which set the case
9 schedule and identified the legal issues to be resolved in this matter.

10 On October 22, 2007, the Board received Petitioners' PFR Revised for Clarification.

11 On October 26, 2007, the Board received Respondent's Objection to Petitioners'
12 Revised Statement of Issues.

13 On October 29, 2007, the Board received Petitioners' Comments to County's
14 Objection to Revised Statement of Issues.

15 On October 30, 2007, the Board held a telephonic status conference to discuss the
16 Petitioners' Revised Statement of Issues and Respondent's Objections.

17 The Board received several Stipulated Motions for Continuance signed by the parties
18 requesting continuances for the purpose of settlement negotiations. These motions were
19 received on November 13, 2007, (60 day continuance), January 10, 2008, (90 day
20 continuance), and March 20, 2008, (60 day continuance). The Board granted these motions
21 respectively on November 15, 2007, January 11, 2008, and March 26, 2008.

22 On May 27, 2008, the Board received Respondent's Motion to Dismiss.

23 On June 10, 2008, the Board received Petitioners' Response to Motion to Dismiss.

24 On June 18, 2008, the Board received Respondent's Reply in Support of Motion to
25 Dismiss.

1 On June 24, 2008, the Board held a telephonic motion hearing.¹ Present were, Joyce
2 Mulliken, Presiding Officer, and Board Members Dennis Dellwo, John Roskelley, and Board
3 staff attorney, Julie Taylor. Present for Petitioners was Jeanie Wagenman and for Stevens
4 County were Peter Scott and Clay White.

5 On June 30, 2008, the Board issued its Order on Respondent's Motion to Dismiss,
6 denying the County's Motion to Dismiss and the Petitioners' Motion to Amend the PFR and
7 granting, in part, the County's Motion to Strike. This Order also reiterated the Legal Issues
8 to be resolved by the Board.

9 On August 27, 2008, the Board held the Hearing on the Merits (HOM). Present were,
10 Joyce Mulliken, Presiding Officer, and Board Members John Roskelley and Raymond
11 Paolella. Present for Petitioners was Jeanie Wagenman and for Respondent was Peter Scott.

12 Also on August 27, 2008, the Board received several documents from the Petitioners
13 and the County. The Petitioners submitted a Statement of Issues, a Summary of
14 Arguments, a Motion to Supplement the Record, and a Motion to Strike. The County
15 submitted an Objection and Motion to Strike.

16 On August 29, 2008, the Board received correspondence from the Petitioners in
17 regards to exhibits and the pending motions to supplement and/or strike.

18 On September 2, 2008, the Board issued a letter pertaining to the exhibits and
19 related motions. With this letter, the Board included certain exhibits within the Record and
20 set forth filing deadlines for arguments on those exhibits still under review.

21 On September 5, 2008, the Board received Steven County's Modified Objection and
22 Motion to Strike.

23 On September 10, 2008 the Board received the Petitioners' Motion to Clarify,
24 Withdraw, and Add County's Exhibits and Petitioners' Substitutions and Petitioners'
25 Response to Respondent's Objections and Motion to Strike and Modified Objection and
26 Motion to Strike.

¹ At the telephonic hearing, the Petitioners orally moved the Board for Leave to Amend the PFR. The Board's response to this motion is contained in the June 30, 2008 Order.

1 On September 15, 2008, the Board received Steven County's Objection to the
2 Petitioner's Motion to Supplement the Record.

3 **IV. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF**
4 **REVIEW**

5 Comprehensive Plans (CP) and Development Regulations (DR), and amendments
6 thereto, adopted pursuant to the Growth Management Act (GMA or Act) are presumed valid
7 upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners
8 to demonstrate any action taken by the respondent jurisdiction is not in compliance with the
9 Act. The Board ". . . shall find compliance unless it determines that the action by the . . .
10 County. . . is clearly erroneous in view of the entire record before the Board and in light of
11 the goals and requirements of the [GMA]." RCW 36.70A.320. To find an action clearly
12 erroneous, the Board must be ". . . left with the firm and definite conviction that a mistake
13 has been committed." *Department of Ecology v. Central Puget Sound Growth Management*
14 *Hearings Board*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000).

15 The Hearings Board will grant deference to counties and cities in how they plan
16 under the GMA. RCW 36.70A.3201. But this deference is not unlimited, as the Court has
17 stated, "local discretion is bounded, however, by the goals and requirements of the GMA."
18 *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543,
19 561, 14 P.2d 133 (2000). It has been further recognized that "...notwithstanding the
20 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes
21 deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA.'
22 *Thurston County v. Cooper Point Association*, 108 Wn. App. 429, 444, 31 P.3d 28 (2001).

23 The Hearings Board has jurisdiction over the subject matter of the Petition for
24 Review (PFR). RCW 36.70A.280(1)(a).

25 **V. PRELIMINARY MATTERS**

26 Before addressing the merits of this case, there are several preliminary matters that
need to be addressed by the Board.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1. Length and Format of Brief

Stevens County states Petitioners' HOM Brief exceeds the 40 page limitation and the exhibits were not tabbed, both of which are requirements set forth in the Board's October 15, 2007 Prehearing Order.² Petitioners concede the brief is over length but assert they made every effort to conform to the Board's requirement and, as to the tabbing, Petitioners contend they were just following examples set by the County in the past.³

Board Discussion

The Board notes Petitioners' HOM Brief is 41 pages, with the final page comprised of eight lines of text, but the filing received by the Board was appropriately tabbed.⁴ The Board does not discount the need for parties to adhere to the briefing parameters set forth in its Order; however, this is not a situation where Petitioners exceeded the page limitation by several pages but by less than one-half of a page. As for the tabbing of exhibits, separation of the exhibits by defined tabs denoting the index number is required for those filings made with the Board, which was accomplished in this matter. The tabbing of exhibits for filings served on the parties is a courteous gesture and the Board suggests all parties follow this practice, regardless of past practices.

The Board will allow Petitioners' over length HOM Brief, which includes the eight lines of text contained on Page 41.

2. Exhibits

Stevens County contends an "overwhelming majority of exhibits attached to Petitioners' brief bear no evidence that they are from the record developed by the County" and it is Petitioners who must demonstrate that the exhibits supporting their argument come from the County's Record.⁵ The Petitioners contend all of their attachments are

² Stevens County Response Brief, at 2. Although the County points out no motion to exceed the ordered limitation was filed or granted, it fails to suggest a remedy for the Board that would alleviate the burden Petitioners' over-length brief and un-tabbed exhibits apparently placed on the County.

³ Petitioners' Reply Brief, at 2.

⁴ The Board further notes the Petitioners' HOM Brief contains over a page of superfluous procedural history which, if deleted, would bring the brief into the required page limitation. See Petitioners' HOM Brief, at 1-2.

⁵ Stevens County Response Brief, at 2.

1 included within the Index of Record submitted by the County, with the exception of
2 excerpts from Title 3, the County's CP, and the St. Goddard's Report, and therefore are
3 properly before the Board.⁶

4 The issue of exhibits was extensively discussed at the August 27, 2008, HOM at
5 which the parties agreed to. The Board approved a Stipulated Agreement upon
6 Attachments⁷ allowing several of the challenged exhibits but permitting the County to
7 further review the Petitioner's exhibits and submit, if necessary, an amended motion.⁸ On
8 September 5, the Board received the County's Modified Objection and Motion to Strike
9 which challenged Petitioners' exhibits for the following reasons: (1) the documents were not
10 contained in the Record; (2) the documents have been altered since submission to the
11 County; (3) the documents are mis-cited; and (4) the documents do not support standing.⁹
12 To support its objections and motion, the County submitted an appendix listing the
13 Petitioners exhibits, denoting the originating Record, and the basis for its objections.¹⁰

14 *Board Discussion*

15 The issue of exhibits has spurred a plethora of Motions to Strike, Motions to
16 Supplement, and Objections to the same so, due to the volume of motions the use of
17 exhibits has created with this matter, the Board will attempt to address each motion
18 accordingly. However, prior to addressing the parties' motions and objections, the Board
19 believes it is important at this juncture to clarify the GMA's requirement for a Record and
20 the related Index of Record. RCW 36.70A.290(4) provides:

21 The Board shall base its decision on the record developed by [the jurisdiction]
22 and supplemented with additional evidence if the Board determines that such

23 ⁶ Petitioners' Reply Brief, at 2.

24 ⁷ With this agreement, the following previously objected to exhibits were included within the Record of this
25 proceeding: Exhibits 4-B, 6-B1, 8-C, 10, 13-G, 17-A, 17-B, 17-D, 18-A, Title 3 Development Regulations, and
26 the Stevens County Comprehensive Plan. See September 5, 2008 Board Letter regarding exhibits

⁸ September 2, 2008 Board Letter regarding exhibits. With this letter, the Board acknowledged agreement on
several exhibits and set a deadline of September 5, 2008 for the County's Amended Motion and September 10,
2008 for any response by Petitioners.

⁹ County's Modified Objection/Strike, at 3-5.

¹⁰ County's Modified Objection/Strike, Attachment to Declaration of Jenni Anderson.

1 additional evidence would be necessary or of substantial assistance to the
2 Board in reaching its decision.

3 In general, *the Record is all of the documents considered by a jurisdiction in taking the*
4 *challenged action.* The Record generally includes minutes of meetings before commissions,
5 committees, or councils, technical and scientific documents, correspondence, laws and
6 regulations, and public comments (oral and written). The *Index to the Record is simply a*
7 *table of contents for the Record* and serves as a listing of documents which may be offered
8 into evidence without objection. The Index can be arranged chronologically or by topic and
9 should sufficiently identify the information contained within the record. The Board does not
10 direct the contents of the Record; rather it accepts it as a good faith effort by the
11 jurisdiction to document the proceedings and the materials used by the County in taking the
12 GMA action.

13 In this matter, the County submitted its Index of Record on October 3, 2007. The
14 Index reflected three cases pending before the Board because the County anticipated that
15 these three cases would be consolidated¹¹ and provided for two attachments: Attachment A
16 – Title 3 Development Regulations Exhibit List; Attachment B – Natural Resource Lands and
17 Comprehensive Plan Exhibit List. Therefore, despite the County's statement that it
18 considered the exhibits lists to be a single, consolidated record, it is clear to the Board that
19 the County's Record in regard to the action under challenged – Ordinance 2007-01, Title 3
20 Development Regulations – is contained within Attachment A to the County's Index of
21 Record. It is also clear from the Petitioners themselves they understood there were
22 separate and distinct Records being developed by the County as the Petitioners requested
23 exhibits from the CP Record be included within the DR Record on several occasions.¹²

24 ¹¹ County Index, at 1. The other two cases referenced were *Futurewise v. Stevens County*, EWGMHB Case No.
25 07-1-0012 and *Davies, et al v. Stevens County*, EWGMHB Case No. 07-1-0014. These two cases were
26 consolidated and have since been dismissed. The Board issued an Order of Dismissal (Davies) on April 14,
2008, and an Order of Dismissal (Futurewise) on September 9, 2008.

¹² See *e.g.* Index of Record, Attachment A, Index Nos. 65, 95, 206, and 269.

1 Thus, **it is Attachment A to the County's Index of Record the Petitioners were to**
2 **utilize when submitting documents to support their arguments.**

3 However, as the Board noted in its September 2, 2008, Letter regarding the exhibits,
4 the GMA does not prohibit a petitioner from utilizing documents they have retained within
5 their own files so long as those documents are included within the Record for the current
6 proceeding. The reasoning behind this is that to require a petitioner to secure new copies
7 would be both inefficient and a waste of resources. But, the parties are reminded the
8 burden remains on the party representing these documents are, in fact, part of the Record,
9 and to show not only that the documents are true and accurate copies of the documents
10 contained within the Record, but to accurately reference those documents with the
11 appropriate Index Number.

12 a. Petitioners' Motion to Supplement the Record¹³

13 With this Motion, the Petitioners seek the addition of a summary authored by Jim
14 Davies on the water quality status of Loon Lake. The summary is dated August 25, 2008.

15 *Board Discussion*

16 Although Stevens County appears to have filed no objection to this exhibit, as noted
17 above, the GMA requires the Board to base its decision on the Record that was before the
18 County. The Petitioners seek to supplement the Record with *a document created more than*
19 *a year after the adoption of the challenged legislative enactment.* Supplemental evidence
20 compiled *after the decision* of the local government has been made is of little relevance in
21 determining whether the County acted in compliance with the GMA *at the time it took the*
22 *action under appeal. Therefore, the Petitioners' Motion to Supplement is DENIED.*

23 b. Petitioners' Motion to Strike¹⁴

24 With this Motion, the Petitioners seek to strike Stevens County's Exhibit 47 asserting
25 it is not part of the Record for the adoption of Title 3, pertains to the compliance
26

25 ¹³ August 27, 2008 Filing

26 ¹⁴ August 27, 2008 Filing

1 proceedings for EWGMHB Case No. 06-1-009c, and is dated after Title 3 was enacted.¹⁵

2 In response, the County contends this document was produced in response to the
3 Petitioners' submittal of Attachment 8D, a map of the Loon Lake LAMIRD which was
4 similarly produced after the adoption of Ordinance 2007-01 and, other exhibits extracted
5 from the Compliance Record.¹⁶ Thus, the County asserts it is just defending against these
6 exhibits from the same source.

6 *Board Discussion*

7 Although the contents of the Record are the province of the County, this does not
8 permit the County to amend the Record at will to incorporate documents which were
9 irrefutably not before the County when making the decision under challenge. County Exhibit
10 47 is not contained within the County's Record for the adoption of Ordinance 2007-01 and
11 is, in fact, a December 14, 2007, Memorandum related to the compliance proceedings of a
12 different case. Although the purpose of this document was to respond to assertions made
13 by the Petitioners, the County was required to seek supplementation of the Record prior to
14 its use and explain to the Board why this document would be necessary or of substantial
15 assistance to the Board in rendering its decision.¹⁷ **This, the County did not do and
16 therefore the Petitioners' Motion to Strike the County's Exhibit 47 is GRANTED.**

16 c. Petitioners' Motion to Clarify, Withdraw, and Add County's exhibits and
17 Petitioners' substitutions

18 With this motion, the Petitioners seek to withdraw, without referencing an exhibit
19 number, the "old Loon Lake LAMIRD map" and substitute this map with the "old Loon Lake
20 LAMIRD Urban Reserve map." The Petitioners also seek to withdrawal Attachment 9 –
21 Notice of Environmental Review and to substitute the "old Title 3 and Comprehensive Plan"
22 copies for the previously submitted "updated" ones, once again without referencing an
23

24 ¹⁵ Petitioners' Motion to Strike, at 2; Petitioners' 8/29/08 Correspondence, at 1

25 ¹⁶ County Modified Objection and Motion to Strike, at 5. The Compliance Record refers to the Compliance
26 Proceedings of EWGMHB Case No. 06-1-0009c.

¹⁷ WAC 242-02-540.

1 exhibit number. Lastly, the Petitioners seek to admit the County's HOM Response Brief
2 Exhibits at Tabs B through I.¹⁸ The County opposes these requests.¹⁹

3 *Board Discussion*

4 The Petitioners appear to mistakenly believe they may add, subtract, or modify the
5 exhibits presented to the Board at any point in the process. Petitioners are required to
6 develop their legal arguments and present those arguments along with the supporting
7 evidence to the Board *prior to the HOM*, with the HOM providing Petitioners the opportunity
8 to highlight and emphasize their arguments. Although the Board will allow for minor
9 corrections to briefing via the filing of an *Errata* Brief or the Board may request post-hearing
10 supplemental briefing and/or exhibits on a specific issue, Petitioners are not permitted to
11 subsequently manipulate the evidence after briefing has been completed and oral
12 arguments have been heard. In addition, if the Board was to consider the Petitioners'
13 request, the Petitioners needed to provide specific citations as to which previously
14 submitted exhibits their request related to; they did not do this and it is not the
15 responsibility of the Board to guess which exhibits the Petitioners were addressing. Lastly,
16 the Board notes the exhibits submitted by the County are already part of the proceedings
17 and there is no need for the Petitioners to seek admission of these exhibits. Once an exhibit
18 has been submitted by a party, either party may present argument based on that exhibit.

19 The Petitioners' exhibits are limited to those exhibits submitted with their HOM
20 briefings. **Therefore, the Petitioners' Motion to Clarify, Withdraw, and Add**
21 **County's exhibits is DENIED.**

22
23
24
25 ¹⁸ Petitioners' Motion to Clarify/Withdraw/Add/Substitute
26 ¹⁹ County's Response to Petitioners' Motion to Supplement.

1 d. County's Objection and Motion to Strike²⁰

2 The County objects to certain evidence and arguments submitted by the Petitioners
3 in their briefing. In support of these objections, the County submits an Index of the
4 Petitioners' Attachments from which the Board notes the following in regards to the 88
5 attachments to the Petitioners' HOM Brief:²¹

6

Originating Record	Number of Exhibits
Title 3 – Development Regulations	4
Comprehensive Plan	62
Compliance Proceedings	21
Unknown Source	1

7
8
9

10 In regard to the 10 attachments submitted with the Petitioners' HOM Reply Brief, the Board
11 notes the following:²²

12

Originating Record	Number of Exhibits
Title 3 – Development Regulations	4
Comprehensive Plan	4
Compliance Proceedings	2

13
14
15

16 As noted *supra*, although the County presented its Index of Record in a consolidated
17 manner due to its belief that three separate PFRs filed with the Board would be
18 consolidated into a single matter. Attachment A to the Index of Record was clearly the
19 Index pertaining to the adoption of the Development Regulations contained in Title 3.
20 However, with Index Nos. 206, 214, and 269, the Petitioners requested inclusion of
21 submittals for the CP Record into the DRs and did submit numerous documents with this
22 request, with some denoted as being from the CP Record. Therefore, by including the

23 ²⁰This section represents objections presented by the County in its HOM Response Brief filed with the Board
24 on August 14, 2008, Objection and Motion to Strike filed August 27, 2008, Modified Objection and Motion to
25 Strike filed September 5, 2008, and Objection to Petitioner's Motion to Supplement the Record filed September
26 15, 2008.

²¹ See Appendix to County's Modified Objection and Motion.

²² See Appendix to County's Modified Objection and Motion

1 actual documents with their request, these documents have become part and parcel of the
2 DRs Record and are available to the Petitioners for use in supporting their arguments.²³
3 However, the challenged action – Ordinance 2007-01 – was adopted on July 2, 2007, and
4 therefore any exhibit produced after that date, with the exception of notices of adoption
5 and/or publication, is simply unavailable for inclusion within the Record without review by
6 the Board as to whether or not the exhibit is necessary or would be of substantial
7 assistance to the Board in rendering its decision. Therefore, to determine if the Petitioners'
8 have supported their argument with exhibits from the Record for Title 3, the Board
9 compared the documents submitted to the Index of Record in conjunction with the County's
objections and determined:

10 The Board finds and concludes the following:

- 11 • All exhibits which represent excerpts from the February 2008 version of the County's
12 DRs (Title 3) do not accurately reflect the challenge before the Board which pertains
13 to the provisions of Title 3 as enacted in July 2007. The County has provided a copy
14 of its DRs as adopted by Ordinance 2007-01.²⁴ Petitioners have requested these
15 regulations be substituted.²⁵ **The Board DENIES the Petitioners' request to**
16 **substitute but shall, pursuant to WAC 242-02-660, take official notice of**
17 **this document, and it is these provisions which the Board will use during**
18 **its review as to whether or not the Petitioners have demonstrated the**
19 **County has failed to comply with the goals and requirements of the GMA.**
- 20 • All exhibits which represent excerpts from the February 2008 version of the County's
21 Comprehensive Plan do not accurately reflect the challenge before the Board as
22 related to consistency between the DRs and the CP in effect at the time of adoption
23 of Ordinance 2007-01. The County's CP in effect at the time was the one amended
24 by Resolution 59-2006 and effective on July 13, 2006, and the County has provided a
25 copy of this document. The Petitioners have requested these provisions be

26

²³ The Board notes that Petitioner Wagenman requested the Comprehensive Plan Record be included within the Development Regulations Record. *See e.g.* Index 65, Index 95. However, these are denoted as simply being a request without any attachments. Simply making a request does not incorporate one Record into another. A petitioner must present those documents to the County that they wish to be included. This, Petitioners appear to have done with Index Nos. 206, 214, and 269, all of which have numerous attachments.

²⁴ County's Modified Objection/Motion, at 2; County Response Brief, Exhibits – Tab A

²⁵ Petitioners' Motion to Clarify/Modify/Add/Substitute.

1 substituted.²⁶ **The Board DENIES the Petitioners' request to substitute but**
2 **shall, pursuant to WAC 242-02-660, take official notice of this document,**
3 **and it is these provisions which the Board will use to during its review as**
4 **to whether or not the Petitioners have demonstrated the County has failed**
5 **to comply with the goals and requirements of the GMA.**

- 6 • The County asserts many of the documents supplied by the Petitioners consist of
7 comments or drafts made by other citizens and, therefore, may not be utilized to
8 demonstrate standing nor may the Petitioners assert argument based on these
9 documents and should be struck.²⁷ Although the Petitioners may not base their
10 standing on the submittals of others, the GMA does not prohibit Petitioners from
11 using documents submitted by other parties and contained in the Record to support
12 their arguments in relationship to the issues presented. **The Board DENIES the**
13 **County's Motion to Strike in this regard.**
- 14 • The County contends many of the references provided by the Petitioners are
15 incorrect and do not reflect the document contained in the Record. The Petitioners
16 respond they can correct mis-numbered exhibits. **The Board DENIES the**
17 **Petitioners' offer to correct their citations.** Petitioners have the duty and
18 responsibility to present a brief which is clear, concise, and provides appropriate
19 citation as to the location of the evidence supporting their argument. If, in the
20 Board's review of the matter evidence cited by the Petitioners does not support the
21 argument because of an erroneous reference number the Petitioners will simply have
22 to suffer the consequences of their error. The Board will not burrow through the
23 Record in an attempt to find the appropriate document nor request correction by the
24 parties.
- 25 • All exhibits for which the County agreed to inclusion, via the Stipulated Agreement
26 upon Attachments approved by the Board at the August 27, HOM, are included
within the Record for these proceedings. Those exhibits are:

21 ²⁶ Petitioners' Motion to Clarify/Modfiy/Add/Substitute.

22 ²⁷ County's Modified Objection/Motion, at 3. The County cites to the WWGMHB's holding in *Friends of Skagit*
23 *County, et al v. Skagit County*, WWGMHB Case No. 07-2-0025c to support this assertion. The County's
24 argument is misplaced in that in the *Skagit County* matter, petitioners were attempting to base participation
25 standing on the submittal of articles not authored by the petitioner which covered a broad subject matter and
26 for which they failed to direct the County's attention to any particular subject. Here, Petitioners are not using
the challenged submittals to support standing; Petitioners are appropriately utilizing the documents contained
in the Record to support their argument and nothing in the GMA restricts them to documents which they alone
submitted to accomplish this task.

1 Exhibit 4-B: Excerpt from Citizen's Guide to Understanding and Monitoring
Lakes and Streams

2 Exhibit 6-B1: Draft Rural Densities Map

3 Exhibit 8-C: CARA Susceptibility Rating Map

4 Exhibit 10: Zoning Map

5 Exhibit 13-G: SCC 3.20 Decision Criteria (2008)

6 Exhibit 17-A: Geological Watershed Loon Lake

7 Exhibit 17-B: Map Loon Lake

8 Exhibit 17-D: Soils Map

9 Exhibit 18-A: SCC 3.02 Purpose & Establishment of Zones (2008)

- 10
- 11
- The County moves the Board to strike "all documents presented by Petitioners in this case except those previously stipulated to."²⁸ The County provides objections to almost 50 exhibits, with more comprehensive textual objections to certain documents within its motion. The Board, in relationship to the County's Motion and after reviewing the Index of Record for Title 3 Development Regulations – Attachment A, including those submittals made with by Petitioners in regard to incorporating the Comprehensive Plan Record at Index Nos. 206, 214, and 269, notes the following:

12

Petitioner's Attachment	Objection by County	Board Conclusion
3	Part of CP Index; Different no graphics; document submitted by Futurewise	Part of Index of Record: Index No. 72; appropriate weight will be accorded due to variation
6C	Part of Compliance Index	Admission Denied - Exhibit is an excerpt of the Feb 2008 Comp Plan
8D	Part of Compliance Index	Admission Denied – Exhibit is Map dated Dec 2007
8J	Part of CP Index; Different because unsigned/undated	Part of Index of Record: Index No. 206; appropriate weight will be accorded due to variation

13

14

15

16

17

18

19

20

21

22

23

24

25 ²⁸ County's Modified Objection/Motion, at 5.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

9	Part of Compliance Index	Admission Denied - Exhibit is dated Feb 2008
12	Part of Compliance Index	Admission Denied - Exhibit is excerpt of the Feb 2008 Title 3
17L	Part of CP Index; Letter to Wagenman from Weisbrod; Annotated	Admission Denied - Exhibit is undated with handwritten reference to e-mail and Exhibit 158 (CP); and is annotated. It is unclear from the Index whether this document is included within submissions made with Index Nos. 206, 214, or 269
17M	Part of CP Index, Different because unsigned/annotated	Part of Index of Record: Index No. 206; appropriate weight will be accorded due to variation
17R	Part of CP Index; Different letter in its entirety	Admission Denied – Exhibit is undated with handwritten reference to Exhibit 668 (CP). It is unclear from the Index whether this document is included within submissions made with Index Nos. 206, 214, or 269.
17U	Part of CP Index; Different because unsigned	Admission Denied – reference Index 701 (CP). Index does not reference this document within submissions made with Index Nos. 206, 214, or 269.
6 (Reply)	Part of DR Index; Different because annotated	Part of Index of Record: Index No. 214; appropriate weight will be accorded

		due to variation
9 (Reply)	Part of CP Index; Different because additional 2 additional lines added	Admission Denied – reference Index 884 (CP). Index does not reference this document within submissions made with Index Nos. 206, 214, or 269.

As for the various documents for which the County noted objection within its Appendix to the Modified Objection and Motion, the Board notes the following:

- For those documents the County has denoted as being different because they lack a signature or contain annotations or underlined/emphasized text, **the Board DENIES the County's Motion to Strike these exhibits but notes these variations, shall disregard annotations, and will accord these documents the appropriate weight given the variation.**
- For those documents the County has denoted as being "not attached" to the Index Number cited by the Petitioners or originating from another Record, if these documents are not explicitly contained within Index Nos. 206, 214, or 269, the Board will disregard any argument based on the exhibit and dismiss it in its entirety. **The Board DENIES the County's Motion to Strike these exhibits at this time but will note such a determination as necessary during the discussion of the issues.**
- **For any document produced after July 2, 2007, whether submitted by the Petitioners or the County, the Board will not permit admission to the Record unless a proper motion to supplement the record has been filed.** If during its review of the matter the Board discovers such a submittal, the Board will note such a discovery during the discussion of the issues and the document and related arguments will be disregarded and dismissed in its entirety.

Conclusion - Exhibits

The Record for these proceedings includes those documents contained within Attachment A to the County's Index of Record filed with the Board on October 3, 2007. The Record includes SCC Title 3 DRs as adopted on July 2, 2007, by Ordinance 2007-01 and

1 SCCP effective July 13, 2006, by Resolution 59-2006. The Board shall accord appropriate
2 weight to documents which are contained within the Record but have been modified in
3 some regard by the Petitioners. If, during the analysis of the issues the Board determines
4 additional exhibits presented by the Petitioners or the County are not contained within the
5 Record for this proceeding and/or were created after July 2, 2007, the Board will note such
6 a determination, disregard any argument based on this exhibit, and dismiss the exhibit in its
7 entirety.

8 With this discussion and analysis, the Board hopes the parties are clear on what the
9 Record before the Board is and what is required of both the Petitioners and the County in
10 this regard. Matters are won and lost on the evidence which supports the parties'
11 arguments and the parties are effectively put on notice that **the Board, in future matters
12 involving these parties, will not tolerate a similar distortion and misapplication
13 of the Record.**

14 **3. SEPA Challenge**

15 With Legal Issue 10, the Petitioners assert Stevens County failed to comply with the
16 State Environmental Policy Act (SEPA), RCW 43.21C, when adopting Title 3. Stevens County
17 contends the Petitioners are barred from raising this issue because they failed to seek
18 mandatory review at the County level as required by RCW 43.21C.075(4) and SCC
19 3.7.1.C.²⁹ The County notes the Integrated Final Environmental Impact Statement (FEIS)
20 was issued on December 23, 2005, and any aggrieved party must have sought review
21 before the Board of County Commissioners (BOCC) within ten days of issuance as provided
22 for in SCC 3.7.1.C. The County points to a similar issue raised in EWGMHB Case No. 06-1-
23

24 ²⁹ County Response Brief, at 9 (citing to *Wilma v. Stevens County*, EWGMHB Case No. 06-1-0009c, FDO at 84
25 (March 12, 2007) in which the Board concluded petitioners SEPA issue were barred because they failed to
26 seek mandatory review at the County level). The Board notes the County references SCC 3.7.1.C but Exhibit D
denotes the appeals provisions as 3(A)(1)(c).

1 0009c, for which the Board concluded these same Petitioners were barred from challenging
2 the FEIS.³⁰

3 The Petitioners concede they did not appeal the FEIS as required by the County's
4 SEPA Ordinance and thus, failed to exhaust the administrative appeals process.³¹ However,
5 the Petitioners contend although they may be barred from appealing the FEIS, they are not
6 barred from showing the Board environmental concerns were simply side-stepped and the
7 lack of regard for these concerns is the basis for their appeal of Title 3.³² The Petitioners
8 argue the second half of Issue 10 can still be addressed because it does not assert a
9 violation of SEPA and argument was presented in regards to environmental impacts, such
10 as water limitations, which elaborates on the second part of the issue and goes to the
11 GMA's consideration of the environment contained to RCW 36.70A.020(10).³³

12 *Board Discussion*

13 Pursuant to Stevens County Code:

14 [A person] may appeal the County's *procedural compliance* with chapter 197-
15 11 WAC for issuance of ... a FEIS: Appeal of an FEIS, or any condition
16 attached thereto, must be made to the Board of Stevens County
17 Commissioners within ten (10) working days of the date the FEIS is final.³⁴

18 The Board does not dispute the Petitioners have standing to raise issues related to SEPA
19 before the Board as they have brought environmentally-based concerns, such as impacts to
20 critical areas and watersheds, water quality and quantity, and wildlife habitat, before the
21 County during the adoption process of Ordinance 2007-01.³⁵ However, under SEPA, even if

22 ³⁰ *Wilma, et al v. Stevens County*, EWGMHB Case No. 06-1-0009c, FDO at 85 (March 12, 2007)(Holding "The
23 Petitioners contend that the FEIS did not sufficiently cover environmental concerns, such as rural character,
24 impervious surface impacts and the impacts associated with five and ten acre zoning ... but the Petitioners are
25 barred from advancing this issue now.")

26 ³¹ Petitioners Reply Brief, at 28

³² Petitioners Reply Brief, at 28

³³ Petitioners Reply Brief, at 28.

³⁴ County Response Brief, Exhibit D, Former SCC, Section 3(A)(1)(c)(Emphasis added).

³⁵ See *e.g.* Index of the Record – Index 65, Index 95, Index 206, Index 214, Index 242, Index 269.

1 a party has standing to raise the issue, a party must still exhaust their administrative
2 remedies prior to further review of administrative actions and the County's own code
3 provision similarly requires exhaustion for challenges to *procedural compliance*, as opposed
4 to *substantive compliance*.³⁶ Here, the Petitioners are challenging the adequacy of the FEIS
5 issued in December 2005 in regards to the analysis and consideration of environmental
6 impacts which, pursuant to RCW 43.21C.075(3)(a), is a *procedural* challenge.³⁷ Because the
7 Petitioners failed to utilize the administrative appeal procedures available to them before
8 seeking review by the Board, the Petitioners have failed to exhaust their administrative
9 remedies and dismissal of the issue is appropriate.³⁸

9 In addition, it is evident from this issue statement³⁹ and the introductory clause
10 utilized in the Petitioners' HOM Brief – "Lack of SEPA Environmental Review" – Legal Issue
11 10 asserts a violation of SEPA, not a violation of the GMA. No citation is made in the issue
12 statement as to a single provision of the GMA for which the County may have violated and,
13 when read in context of the statement itself, the issue is clearly whether the County

14 ³⁶ RCW 43.21C.075(4), SCC 3(A)(1)(c). The Board notes the purpose of the exhaustion requirement is based
15 on a number of legal policies: (1) It avoids premature interruption of the administrative process, (2) provides
16 for full development of the facts, and (3) allows the exercise of agency expertise. The doctrine also protects
17 the autonomy of administrative agencies by giving them the opportunity to correct their own errors, which in
18 this situation would be the county commissioners. Lastly, the doctrine also discourages parties from ignoring
19 administrative procedures by resorting to the Board or the Courts and allows the administrative review process
20 to run its course. Thus, by not appealing the EIS as required, the County Council did not have an opportunity
21 to correct any errors it might have made or to develop a factual and technical record for adequate review by
22 the Board.

19 ³⁷ See also, SEPA Handbook, Chapter 11-Appeals.

20 ³⁸ See e.g. *CLEAN v. City of Spokane*, 133 Wn.2d 455, 465 (1997)(finding that a plaintiff alleging
21 noncompliance with SEPA must exhaust administrative remedies before filing suit; where an agency has an
22 appeal procedure in place, an aggrieved person is required to seek redress under that procedure before
23 seeking judicial review.); *Citizens for Clear Air v. Spokane*, 114 Wn.2d 20, 27 (1990)(holding that the Supreme
24 Court will not consider SEPA claims unless plaintiffs exhaust available administrative remedies before suing).

22 ³⁹ Legal Issue 10, as set forth in the Petitioners *Revised* Issue Statement is as follows:

23 Has Stevens County failed to comply with the requirements of RCW 43.21C in adopting Title 3,
24 Development Regulations? Did Stevens County fail to consider and address the environmental
25 impacts upon critical areas, watersheds and wildlife when Title 3 assigned uses, lot sizes and
26 densities in the Rural areas of the County?

1 considered and addressed the environmental impacts of its action as required by RCW
2 43.21C. The Board will not, as the Petitioners suggest, read Issue 10 to be anything other
3 than an issue based upon an alleged violation of SEPA nor will the Board transform the
4 arguments presented for this issue into supporting arguments for other issues. It is the
5 responsibility of the Petitioners to craft their issue statements to accurately reflect their
6 concerns and to draft their arguments accordingly.

7 **The Board finds and concludes that although the Petitioners have standing**
8 **to raise an issued based on SEPA, the Petitioners have failed to exhaust**
9 **administrative remedies available to them under Stevens County Code and are**
10 **barred from challenging the adequacy the environmental review contained**
11 **within the December 2005 FEIS that served for the basis of the adoption of**
12 **Ordinance 2007-01 which amended Title 3. Therefore since Legal Issue 10 sets**
13 **forth a violation of SEPA in this regard it is DISMISSED in its entirety.**

14 ***4. Standing of Petitioner – Generally***

15 Stevens County asserts Petitioners lack standing to bring this matter before the
16 Board, both in regards to APA standing as well as GMA participation standing. As to APA
17 Standing, the County contends the Petitioners have alleged no personal harm or prejudice
18 and there has been no factual showing or perceptible harm. As for participation standing,
19 the County argues the Petitioners have failed to show a reasonable relationship exists
20 between their participation and the legal issues presented for review.⁴⁰

21 The Petitioners reply the appropriate time to challenge standing would have been
22 upon the filing of the PFR. The Petitioners cite to numerous submissions made by them and
23 contained within the Index to the Record to support their standing in this matter and
24 include copies of these submittals with the reply briefing.⁴¹

25 *Board Discussion*

26 ⁴⁰ County Response Brief, at 4-5.

⁴¹ Petitioners' Reply Brief, at 4-6

1 Although the Board concurs with the Petitioners a challenge to standing is more
2 properly brought early in the proceedings, thereby potentially eliminating the expenditure of
3 resources by all parties and the Board, challenges to standing are deemed jurisdictional and
4 may be brought at any time.⁴² Stevens County asserts the Petitioners have failed to satisfy
5 APA standing, however, within their PFR the Petitioners did not assert APA standing but
6 stated:⁴³

7 Larson Beach Neighbors and Jeanie Wagenman have attended several of the
8 meetings and have written and orally testified about the development
9 regulations, sharing concerns.

10 Therefore, the Petitioners must satisfy RCW 36.70A.280(2)(b) which governs the
11 participation standing requirements for appearing before the Boards. This provision
12 provides, in relevant part (emphasis supplied):

13 *A petition may be filed only by: . . . a person who has participated orally or in
14 writing before the county or city regarding the matter on which a review is
15 being requested.*

16 In *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App.
17 657, 999 P.2d 405 (2000), the Court of Appeals clarified that, to establish participation
18 standing under the GMA, a person must show that his or her participation before the
19 jurisdiction was reasonably related to the person's issue as presented to the Board. The
20 *Wells* Court stated that a "matter," as intended by RCW 36.70A.280(2)(b), is not the
21 equivalent of an "issue" and "all three growth management hearings boards have
22 consistently rejected a requirement of issue-specific standing."⁴⁴ The Court concluded that
23 "matter" in RCW 36.70A.280(2)(b) refers to a broad "subject or topic of concern or
24 controversy."⁴⁵ Thus, the Court held participation standing is not issue-specific, stating
25 "[O]ur conclusion [is] that the Legislature did not intend petitioners to raise specific legal
26

⁴² *Harader v. Napavine*, WWGMHB no. 40-2-0017c, FDO at 4 (February 2, 2005) citing *Sullivan v. Paris*, 90 Wn.App. 456, 460 (1998); *Diehl v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 118 Wn.App. 212, 75 P.3d 975 (2003).

⁴³ PFR, Revised for Clarification on Oct. 22, 2007, at 4.

⁴⁴ *Id.* at 671.

⁴⁵ *Id.* at 672-73.

1 issues during the local government planning process.”⁴⁶ The Court went on to say: “[I]t
2 would be unrealistic given the time and resource constraints inherent in the planning
3 process to require each individual petitioner to demonstrate to the growth management
4 hearings board that he or she raised a specific legal issue before the board can consider
5 it.”⁴⁷ The enactment of RCW 36.70A.280(4) incorporated the *Wells* holding into the GMA.⁴⁸

6 Stevens County contends the Petitioners have made no showing whatsoever
7 regarding their participation because the exhibits attached to the Petitioners’ brief includes
8 only one comment letter from the Petitioners which pertains to the adoption of the County’s
9 CP, with the balance of the exhibits authored by other parties.⁴⁹ In essence, the County
10 appears to assert the Petitioners’ standing is limited to those exhibits specifically attached to
11 their brief. Although the County is correct in stating the Petitioners may not base their
12 standing on submittals of others, the County is incorrect in its assertion a determination on
13 standing is limited to those exhibits specifically attached to the Petitioners’ HOM Brief.
14 Once standing is challenged by a jurisdiction, Petitioners are permitted to come forward
15 with evidence to demonstrate their participation satisfy the requirements of the GMA. *This*
16 *evidence stems from the County’s Record, which reflects all of the information before the*
17 *County when the decision was being made, not just those exhibits submitted with the*
18 *Petitioners’ HOM briefing which were intended to support their arguments.* Here, the
19 Petitioners have accomplished that with the submittal of Attachments 2A through 2F.
20 These attachments, with the exception of Attachment 2F, reflect comments submitted by
21 the Petitioners in 2006 and 2007 and are clearly contained within the County’s Index of the
22 Record for Title 3 Development Regulations. The comments pertain to rural zoning,

23 ⁴⁶ *Wells*, 100 Wn. App. at 672.

24 ⁴⁷ *Id.* at 674.

25 ⁴⁸ RCW 36.70A.280(4) provides:

26 To establish participation standing under subsection (2)(b) of this section, a person must show
that his or her participation before the county or city was reasonably related to the person’s issue
as presented to the board.

⁴⁹ County Response Brief, at 5.

1 environmental impacts, natural resource lands, and much more – satisfying the requirement
2 Petitioners comments be reasonably related to the issues presented.

3 Because the Petitioners participation is thoroughly documented, the Board finds the
4 Petitioners were diligent in presenting their points of view on the challenged ordinance
5 during the course of its consideration. Their participation was directly related to the issues
6 presented to the Board for review. The Petitioners clearly have standing based on
7 participation as provided for in RCW 36.70A.280(2)(b). The GMA, at RCW 36.70A.280(2)(d),
8 allows for a party to achieve standing pursuant to RCW 34.05.530 (APA standing) *as an*
9 *alternative*; the operative conjunction in .280(2) is "*or*". The Petitioners, have met the GMA
10 threshold for participation as provided in .280(2)(b) and .280(4) and, therefore, do not
11 need to demonstrate individual injury or prejudice which would be required under the APA.

12 **The Board finds and concludes the Petitioners, with the exception of SEPA-**
13 **based claims, have standing to raise the issues presented within their PFR and**
14 **therefore, the County's Motion to Dismiss based on the Petitioners' standing is**
15 **DENIED.**

16 ***5. Abandoned Issues***

17 Pursuant to WAC 242-02-570(1), issues not briefed are deemed abandoned.⁵⁰ The
18 County contends the Petitioners have abandoned several issues in this matter – Issues 1, 2,
19 3, 7, and 12.⁵¹ The Petitioners appear not to challenge the County's assertion of
20 abandonment as a contrary position was not presented in their Reply Brief and, at the
21 August 27 HOM, the Petitioners submitted a *Revised* Statement of the Issues which
22 denoted only Issues 4, 5, 8, 9, 10, and 11 remained challenged.

23 *Board Discussion*

24 ⁵⁰ See *Woodmansee v. Ferry County*, EWGMHB Case No. 00-1-0006, FDO (Sept. 7, 2000)(Failure of the
25 Petitioner to brief the issues for the final hearing on the merits was an abandonment of those issues).

26 ⁵¹ Stevens County Response Brief, at 1. The County denotes these issues as set forth in the PFR; however,
subsequent to the County's Motion to Dismiss the Board reiterated the Petitioners' Issues in the Board's June
30, 2008, Order on Respondent's Motion to Dismiss. As noted supra, for the purposes of this FDO these are
the issues currently before the Board.

1 The Board notes no argument as to these issues explicitly set forth in the Petitioners'
2 HOM Brief and it is further noted no argument appears to have been presented in regards
3 to Issue 6. Thus, based on the omission of Issues 1, 2, 3, 6, 7, and 12 from the Petitioners'
4 HOM Brief and further supported by the *Revised* Statement of the Issues submitted at the
5 HOM, **the Board finds and concludes Legal Issues 1, 2, 3, 6, 7, and 12 have been**
6 **abandoned by the Petitioners and are DISMISSED in their entirety.**

7 VI. ISSUES AND DISCUSSION

8 With their PFR, the Petitioners challenge the County's adoption of Ordinance 2007-
9 01. With this Ordinance, Stevens County repealed various sections of the Stevens County
10 Code (SCC) but of import to this matter is the adoption of Title 3 – the County's
11 Development Regulations. The adoption of these regulations was the result of almost three
12 years, starting in 2004, and included issuance of an Integrated Environmental Impact
13 Statement (EIS) and the consideration of these regulations before the Stevens County
14 Planning Commission and BOCC, both offering public meetings and hearings throughout the
15 adoption process. The Ordinance was adopted on July 2, 2007, and published in the
16 *Chewelah Independent* shortly thereafter. The Petitioners filed a timely appeal of this
17 enactment on September 10, 2007.

18 As noted *supra*, the Petitioners have abandoned Legal Issues 1, 2, 3, 6, 7, and 12
19 and, therefore, these issues have been dismissed in their entirety and will not be addressed
20 by the Board. Also, the Board found the Petitioners' challenge based on SEPA, RCW 43.21C,
21 as set forth in Legal Issue 10 is barred because the Petitioners failed to exhaust their
22 administrative remedies and will not be addressed. The Board further notes several exhibits
23 have been dismissed and the Record for this proceeding has been extensively scrutinized by
24 the Board and will continue to be scrutinized during the Board's analysis of the issues to
25 ensure the evidence relied on by both parties is contained within the Record and is relevant
26 to these proceedings.

For the purpose of this decision, the Board will respond to the Petitioners' argument
in the same manner the issues were presented to the Board with the Petitioners

1 consolidating Issues No. 5, 8, and 11, consolidating Issues No. 9 and 11, and arguing the
2 remaining Issue No. 4, in isolation.

3 Concurrency

4 Issue No. 4:

5 Has Stevens County failed to comply with the Growth Management Act by failing to
6 require that developments meet the goal RCW 36.70A.020(12) of concurrency? Does Title 3
7 require adequate and available public facilities when the impacts occur? Has the County
8 failed to show their work? Does this substantially interfere with the Goals of the Act and
therefore violate RCW 36.70A.020(12) & RCW 36.70A.070?

9 *Applicable Law, as set forth in Issue Statement:*⁵²

10 RCW 36.70A.020(12)
11 RCW 36.70A.070

12 The Parties' Position:

13 Petitioners LBN and Jeanie Wagenman:

14 The Petitioners contend Stevens County's DRs Title 3 does not reflect the GMA's
15 concurrency requirement in its entirety by failing to include language in regards to a
16 prohibition against decreasing current level of services (LOS) below locally established
17 minimum standards.⁵³ To support this assertion, the Petitioners' point to SCC 3.20.035
18 Preliminary Subdivisions and Short Subdivisions, and contend it contains no criteria for
19 approval based on the concurrency goal. The Petitioners also cite to the Board's previous
20 holding in *Wilma, et al. v. Stevens County*, where the Board held the County failed to have
21 minimum service levels within its CP and, therefore this deficiency is reflected in Title 3 as
22 well.⁵⁴

23 _____
24 ⁵² Petitioners provided no citation to RCW 36.70A.070 within their HOM Brief nor did they submit argument on
how Title 3 violated RCW 36.70A.070. Thus, any alleged violation of this provision of the GMA is deemed
abandoned.

25 ⁵³ Petitioners' HOM Brief, at 40.

26 ⁵⁴ Petitioners' HOM Brief, at 40 (citing to EWGMHB Case No. 06-1-0009c)

1
2 **Respondent Stevens County:**

3 Stevens County points to SCC 3.20.035(A)(1) to show Title 3 prohibits approval of a
4 development unless the applicant demonstrates provisions have been made for facilities and
5 services such as roads, water, sanitary waste, and drainage.⁵⁵ The County goes on to cite
6 other SCC provisions which require adequate facilities and services prior to development
7 approval such as conditional use permits and zoning reclassifications.⁵⁶

8 In response to the Petitioners' allegation of this Board's holding in a previous case,
9 the County notes this matter is not dependent on the previous decision because Stevens
10 County's Title 3 requires services and facilities shall be consistent with any level of service
11 (LOS) standards contained within the County's CP or within Title 3.⁵⁷

12 **Petitioners LBN and Jeanie Wagenman HOM Reply:**

13 In reply, the Petitioners reiterate the County has not adopted any LOS standards and
14 therefore any Title 3 provision which requires consistency means little.⁵⁸ The Petitioners
15 further reiterate Title 3 is missing the GMA's language to prohibit development if it would
16 *decrease* current service levels below minimum standards, giving the County and its
17 planners' discretion as to what is adequate.⁵⁹

18 **Board Analysis:**

19 The Petitioners cite to what has been termed the GMA's Concurrency Goal, RCW
20 36.70A.020(12), which provides:

21 Public facilities and services. Ensure that those public facilities and services
22 necessary to support development shall be adequate to serve the
23 development at the time the development is available for occupancy and use

24 ⁵⁵ County Response Brief, at 11-12 (citing to SCC 3.20.035 and noting that the requirements are taken from
25 RCW 58.17.110(2) [County's brief cites to RCW 57.17.110, but the correct provision is 58.17.110])

26 ⁵⁶ County Response Brief, at 12

⁵⁷ County Response Brief, at 12

⁵⁸ Petitioners' Reply Brief, at 32

⁵⁹ Petitioners' Reply Brief, at 32

1 without decreasing current service levels below locally established minimum
2 standards.

3 In *Wilma, et al. v. Stevens County*, in addressing LOS standards in regards to UGAs and the
4 CP, the Board stated:⁶⁰

5 Capital facilities planning is to occur in light of Goal 12, not in lieu of Goal 12.
6 ... Goal 12 gives context to RCW 36.70A.070(3) and requires *a locally*
7 *established single minimum (level of service - LOS) standard to provide the*
8 *basis for objective measurement of need and system performance for those*
9 *facilities locally identified as necessary.* This minimum standard must be
10 clearly indicated within the CFE [Capital Facilities Element] as the baseline
11 standard, below which the jurisdiction will not allow service required by the
12 capital facilities element to fall. Without such a baseline standard, growth
13 could not be *managed* as required by the GMA because there would be no
14 analytic basis from which to determine if capacity could accommodate the
15 additional demand put upon it.

16 Therefore, in the *Wilma* case the Board held the *Capital Facilities Element was to set forth*
17 *the LOS standards* for those public facilities and services Stevens County has determined
18 are necessary to support development which, at a minimum, included domestic water and
19 sanitary sewer service.⁶¹ The reasoning for including LOS standards within the C CP as
20 opposed to the DRs is to prevent these standards from being modified more than once a
21 year.⁶² In *Wilma*, the Board also noted establishing a LOS is an objective way to measure
22 the adequacy of a facility or service, but the GMA does not dictate what is inadequate; the
23 setting of a LOS standard is a policy decision left to the discretion of local elected
24 officials.⁶³ Nothing in the *Wilma* decision equates to requiring LOS standards to be set forth
25 in *Development Regulations*, and the propriety of the County's CP is not before the Board in
26 this matter.

23 ⁶⁰ *Wilma, et al v. Stevens County*, EWGMHB Case No. 06-1-0009c, Order on Reconsideration, at 12 (June 25,
24 2008) (Mulliken dissenting on Capital Facilities)

24 ⁶¹ *Wilma, et al.* EWGMHB Case No. 06-1-0009c, at 13-14.

25 ⁶² RCW 36.70A130(2)(a) provides that a comprehensive plan amendment may not be considered more
26 frequently than once per year. This same restriction is not applicable to development regulations.

26 ⁶³ *Wilma, et al.* EWGMHB Case No. 06-1-0009c, at 13-14.

1 In addition, unlike RCW 36.70A.070(6) which requires an action-forcing "concurrency
2 ordinance" which prohibits development approval if the development causes a decline below
3 LOS standards for transportation facilities, Goal 12, in conjunction with RCW 36.70A.070(3),
4 *does not require* the adoption of a specific "concurrency ordinance" that similarly prohibits
5 approval if the development causes the LOS standard for a non-transportation public facility
6 or service (identified as being necessary to support development) to decline below the
7 locally adopted minimum standards.⁶⁴ However, a local jurisdiction clearly has discretion
8 under RCW 36.70A.020(12) and .070(3) to adopt such an ordinance for non-transportation
9 public facilities and services.

10 The Petitioners state that although Title 3 does contain "some language" about
11 adequate facilities and services -- citing specifically to SCC 3.20.035, the approval criteria
12 for Preliminary Subdivisions and Short Subdivisions -- they assert Title 3 still fails to contain
13 criteria for approval based on Goal 12. Other than citing to SCC 3.20.035, the Petitioners
14 provide no other guidance as to which provisions of Title 3 allegedly violate RCW
15 36.70A.020(12). It is not the Board's responsibility to read every provision set forth in Title
16 3 in order to determine if the Petitioners' argument has merit and, therefore, the Board will
17 address only the cited provision. SCC 3.20.035, as adopted by Ordinance 2007-01,
18 provides, in relevant part (Emphasis added):

19 A. The county will *consider the following criteria* in reviewing applications for
20 preliminary subdivisions and short subdivisions, and *may only grant*
21 preliminary approval if the applicant demonstrates *all of the criteria are met*

22 1. *Provisions are made for, but not limited to, the public health, safety, and*
23 *general welfare, for open spaces, drainage ways, streets, roads, alleys, other*
24 *public ways, transit stops, potable water supplies, sanitary wastes, parks and*
25 *recreation, playgrounds, sites for schools and school grounds, fire protection*

26 ⁶⁴ RCW 36.70A.070(6)(b) requires the adoption and enforcement of ordinances which prohibit development approval if the development causes the LOS on locally-owned transportation facilities to decline below the standards adopted in the Transportation Element of the Comprehensive Plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. In contrast, neither RCW 36.70A.020(12) nor 36.70A.070(3) contain such development prohibition language. See *McVittie v. Snohomish County*, CPSGMHB Case No. 99-3-0016c.

1 *and other public facilities.* The decision maker shall consider all other relevant
2 facts, including the physical characteristics of the site, the presence or
3 absence of sidewalks and other planning features that assure safe walking
4 conditions for students who only walk to and from school, and shall determine
5 whether the public interest will be served by the subdivision and dedication.

6 2. If the decision maker finds the proposed Preliminary Subdivision/Short
7 Subdivision *makes appropriate provisions* for the matters listed in SCC
8 3.20.035(1) ... then it shall be approved.

9 3. If the decision maker finds that the proposed subdivision/short subdivision
10 *does not make appropriate provisions* ... shall deny the proposed preliminary
11 subdivision/short subdivision.

12 It is clear from the language of SCC 3.20.035, the County is to consider the
13 adequacy of public facilities and services during the subdivision approval process. The Board
14 notes, with SCC 3.04.020, Stevens County sets forth several performance standards all land
15 use activities must conform to, including SCC 3.04.020(E) which provides (Emphasis
16 added):

17 Services & Facilities. Services and facilities shall be *adequate to serve* the
18 intended use, and *shall be consistent with any level of service standards for*
19 *urban or rural areas* contained in the Stevens County Comprehensive Plan or
20 the provisions of this Title.

21 While it may be true the County, upon adoption of Ordinance 2007-01, had no LOS
22 standards set forth in its CP or within Title 3, the language of SCC 3.04.020(E) is explicit in
23 the requirement that services and facilities should not only be *consistent* with LOS
24 standards but be *adequate* to serve the proposed development. SCC 3.01.030 further
25 provides that all land uses and development authorized by Title 3 shall comply with all other
26 Stevens County regulations and/or applicable requirements of local, state or federal law –
this would include the provisions of Title 3 as well as the GMA.

 The mere fact the County did not elect to use the word “decrease” does not amount
to a clearly erroneous violation of the GMA as the Board reads the use of “consistent” to

1 mean in agreement with or equal to, thereby inferring a decrease would not be permitted.
2 Therefore, once the County has enacted the necessary LOS standards, an objective baseline
3 will be available for review of proposed land use applications and Title 3 provides for such a
4 review. But, until then, review of proposed applications is still required to ensure adequate
5 provisions have been made. Stevens County is not immune from complying with the GMA
6 just because their own code provisions do not parallel the words of the GMA.

7 The Board notes with this Issue Statement the Petitioners asserted Stevens County
8 failed to "show its work" and allegedly violated RCW 36.70A.070, but did not present any
9 argument in that regard and as such, those claims are deemed abandoned.⁶⁵

10 **Conclusion:**

11 The Petitioners have failed to demonstrate Stevens County, with the adoption of
12 Ordinance 2007-01, fails to comply with the GMA's concurrency requirements for public
13 facilities and services as set forth in RCW 36.70A.020(12). Although the GMA does require
14 public facilities and services to be adequate so as to not decrease current LOS below locally
15 established minimum standards, the GMA does not require an action-forcing concurrency
16 ordinance in regards to public facilities and services which would preclude development if
17 the development caused the LOS to decline below adopted standards. The County has
18 provided for adequacy of such facilities and services in relationship to the proposed
19 development and has further required that development proposals are to be consistent with
20 any adopted LOS standard.

21 **Natural Resource Lands**

22 **Issue No. 9:**

23 Does Title 3 fail to conserve Natural Resource Lands (NRL)? Do the densities,
24 clustering, lot size and uses in NRL comply with GMA? Did the County consider factors for
25 designation and conservation of NRL as in WAC 365-190? Does this violate the GMA and
26 RCW 36.70A.060, 070, 170, RCW 36.70A.177, RCW 36.70A.050. Does this substantially
interfere with the Goals of the Act? (#8)

⁶⁵ The Board further notes that the requirement to "show your work" has been applied only to the sizing of an Urban Growth Area pursuant to RCW 36.70A.110.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Issue No. 11:⁶⁶

Do the uses, lot sizes, densities allowed in Title 3 (including LAMIRDS) allow urban development outside urban growth areas (UGA) in violation of RCW 36.70A.110 fail to protect the rural character, the environment, critical areas, water quality and quantity and natural resource lands in violation of RCW 36.70A.020(1-2), RCW 36.70A.020(8-10) RCW 36.70A.020(12), RCW 36.70A.040, RCW 36.70A.060, RCW 36.70A.070, RCW 36.70A.110 and RCW 36.70A.172 and .177? These uses, lot sizes and densities are found in chapters 3.02, 3.03, 3.04, 3.05, 3.06, 3.07, 3.11, 3.16, 3.20 but are not limited to those chapters. Does this substantially interfere with the Goals of the Act?

Applicable Law, as set forth in the Issue Statements:⁶⁷

- RCW 36.70A.020(1), .020(2), .020(8), .020(10), .020(12)
- RCW 36.70A.040
- RCW 36.70A.050
- RCW 36.70A.060
- RCW 36.70A.070
- RCW 36.70A.110
- RCW 36.70A.170
- RCW 36.70A.172
- RCW 36.70A.177
- WAC 365-190

The Parties' Position:

Petitioners LBN and Jeanie Wagenman:

According to the Petitioners, the purpose of these issues is to distinguish separately

⁶⁶ The majority of Issue 11 was analyzed in regards to critical areas protection. For natural resource lands, Petitioners' issue statement set forth in their HOM Brief cites to Goals 1, 2, 8, 10, and 12, and provisions 36.70A.010, .040, .070 etc. The Petitioners are advised to fully set forth the issue statement within their briefing as paraphrasing, using ellipsis, or contractions (such as "etc.") may lead to the conclusion that the Petitioners are abandoning certain elements of their issue.

⁶⁷ Petitioners set forth a variety of GMA provisions within Legal Issues 9 and 11; however, the Board notes that in Petitioners' HOM Brief they cite only to RCW 36.70A.020(8) and failed to submit argument on how Title 3 violated any of the other cited provisions. It is for the Petitioners, not the Board, to set forth the argument as to which provision of the GMA was allegedly violated and to how Title 3 violated the cited provision. Thus, any alleged violation of these provisions of the GMA is deemed abandoned. Petitioners do allege Title 3 violates RCW 36.70A.170 in their reply brief, but failure to provide argument supporting this assertion in the opening brief precludes the resurrection of the claim on reply.

1 natural resource lands (NRL) from rural lands and the need for NRL to be maintained and
2 enhanced.⁶⁸ The Petitioners contend Stevens County's zoning reclassification provisions,
3 SCC 3.20.020, fails to contain criteria and/or standards that would preclude the rezoning of
4 NRL to a rural zone and, furthermore, the Petitioners argue there is no criteria in regards to
5 the long-term commercial significance of such lands or the consideration that went into the
6 designation of NRL.⁶⁹ The Petitioners assert without specifics, the County fails to maintain
and enhance these lands as required by the GMA.

7 **Respondent Stevens County:**

8 Stevens County notes that although the Petitioners parenthetically reference portions
9 of Issue 11 were "argued above," the Petitioners fail to reference to a page or section so it
10 is unclear as to what is being referred to.⁷⁰ The County contends the Petitioners' assertions
11 are without merit and interprets the Petitioners' argument as being whether designated NRL
12 are protected from rezoning. In opposition to this claim, the County points to several
13 provisions of the SCC which provide criteria applicable to the reclassification of NRL, such as
14 SCC 3.31.010, 3.31.080, and 3.20.020.⁷¹

15 **Petitioners LBN and Jeanie Wagenman HOM Reply:**

16 In reply, the Petitioners reiterate their assertion the County cannot conserve and
17 maintain NRL if the zoning reclassification does not contain criteria for designation and de-
18 designation.⁷² The Petitioners cite to this Board's holding in *Kittitas County Conservation et*
19 *al. v. Kittitas County* and the Washington State Supreme Court's holding in *Lewis County v.*
20 *WWGMHB* to support their contention that the SCC must contain all of the definitional
elements for NRL as provided for in the GMA.⁷³

21 According to the Petitioners, the SCC provisions "do not do enough" to protect NRL

22 ⁶⁸ Petitioners' HOM Brief, at 39.

23 ⁶⁹ Petitioners' HOM Brief, at 39-40.

24 ⁷⁰ County's Response Brief, at 11.

25 ⁷¹ County's Response Brief, at 11.

26 ⁷² Petitioners' Reply Brief, at 29-30

⁷³ Petitioners' Reply Brief, at 30-31(citing *Kittitas County Conservation et al v. Kittitas County*, EWGMHB Case No. 07-1-0004c; *Lewis County v. WWGMHB*, 157 WN.2d 488 (2005)).

1 when even the zone definitions themselves fail to incorporate the GMA criteria.⁷⁴ The
2 Petitioners further state the Board should impose partial invalidity in order to protect these
3 lands until the County achieves compliance.⁷⁵

4 **Board Analysis:**

5 The Board notes the Petitioners focus their arguments, with only cursory reference,
6 on RCW 36.70A.020(8) and SCC 3.20.030, essentially asserting if Title 3 itself does not
7 contain specific criteria the County is not maintaining and enhancing natural resource lands.
8 As the Board has previously stated, the GMA sees natural resource lands and the industries
9 relying on them as something special given the duty set forth to *designate* natural resource
10 land⁷⁶ and *conserve*⁷⁷ such land in order to *maintain* and *enhance*⁷⁸ the natural resource
11 industry.⁷⁹ Through RCW 36.70A.020(8), .060, and .170, the GMA directs counties and
12 cities to protect natural resource lands by:

- 13 1. *Designating* natural resource lands of long-term commercial significance;
- 14 2. Assuring the *conservation* of natural resource land;
- 15 3. Assuring that the use of adjacent lands *does not interfere* with their continued use
16 for natural resource purposes;
- 17 4. Conserving natural resource land in order to *maintain and enhance* the resource
18 industry; and
- 19 5. *Discouraging* incompatible uses.⁸⁰

20 Unlike critical areas which are protected for their intrinsic values and functions, natural
21 resource lands are not in and of themselves protected; rather it is the maintenance and
22 enhancement of the industries relying on these lands that is afforded protection.

23 The Petitioners' argument is founded on SCC 3.20.020, the County's rezone

24 ⁷⁴ Petitioner's Reply Brief, at 30-31(citing to SCC 3.02.030)

25 ⁷⁵ Petitioners' Reply Brief, at 31.

26 ⁷⁶ See RCW 36.70A.170

⁷⁷ See RCW 36.70A.060

⁷⁸ See RCW 36.70A.020(8)

⁷⁹ *Kittitas County Conservation, et al v. Kittitas County*, EWGMHB Case No. 07-1-0004, Compliance Order at 17
(Aug, 7, 2008)

⁸⁰ *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 588 (2000).

1 provision, which provides (Emphasis added):

2 SCC 3.20.020 Zoning Reclassification (Rezone).

3 A. The county will consider the following criteria in reviewing applications for
4 *zoning* reclassifications, and may only approve an application if the applicant
5 demonstrates that all of the criteria are met:

- 6 1. *The proposal is consistent with the goals and policies of the CP and*
7 *Subarea Plan where applicable;*
- 8 2. Environmental impacts associated with the use can be adequately
9 mitigated through the imposition of reasonable conditions;
- 10 3. Adequate services and facilities, including transportation facilities, will be
11 available to serve the range of uses in the proposed zoning classification;
- 12 4. The proposed reclassification is warranted because of a change in
13 circumstances, or because of a demonstrated need for additional land
14 within the proposed zoning classification, or because the proposed
15 classification is appropriate for reasonable development of the subject
16 property;
- 17 5. The reclassification does not reflect special treatment of the subject
18 property; and
- 19 6. The reclassification would promote the general health, safety and
20 welfare of the community.

21 From the Petitioners' argument, it would appear they believe the GMA's definition of natural
22 resource lands and the related designation criteria should be explicitly set forth within SCC
23 3.20.020.⁸¹ However, what the Petitioners fail to realize is these requirements are
24 incorporated within the rezone review criteria provisions.

25 First of all, SCC 3.20.020 requires a proposed rezone to *satisfy all six of the listed*
26 *criteria* and the very first criteria listed requires a proposed rezone be consistent with the

22 ⁸¹ Petitioners' cite to the Board's decision in *Kittitas County Conservation* to support their assertion that the
23 County's development regulations must contain not only the GMA's definitional elements for resource lands
24 but the designation criteria as well. The Petitioners misread the Board's holding. In that case, the Board held
25 that all of the elements of the definition must be explicitly *incorporated within the County's CP*. Nothing in the
26 Board's decision requires explicit, parallel language within the development regulations. *See also, Hadaller, et*
al v. Lewis County, WWGMHB Case No. 08-2-0004c coordinated with compliance proceedings for WWGMB
Case Nos. 00-2-0031c and 99-2-0027c, Compliance Order & FDO, at 59-60 (July 7, 2008)(holding no clear
error in including the designation criteria in the Comprehensive Plan rather than within the County Code).

1 goals and policies of the County's CP. The Board notes the Natural Resources Element to
2 the County's CP not only sets forth an overarching goal to maintain and enhance natural
3 resource-based industries and provide for the conservation and productive use of forest,
4 mineral, and agricultural lands,⁸² it also provides for various policies such as NR-3, NR-4,
5 NR-5, and NR-7 (Agricultural Land Designation), NR-6 and NR-7 (Forest Land Designation),
6 and NR-8, NR-9, and NR-10 (Mineral Land Designation) which, specifically for agricultural
7 and forest lands, incorporate the "long-term commercial use" terminology , denoting that
8 designation must comply with the requirements of the GMA and consider the guidance
9 provided in WAC 365-190.⁸³ The Board recognizes these CP policies relate to the
10 *designation* of NRL, however, the Board has previously stated the *de-designation* of natural
11 resource lands demand the same analysis and evaluation as the initial designation.⁸⁴ Thus
12 for NRL to be de-designated, it must first be determined to no longer satisfy the
13 designation criteria set forth in the County's CP.

14 In addition, the designation of land is an element of the CP and its Future Land Use
15 Map (FLUM), which sets forth the generalized GMA land use designations, and it is the
16 zoning code and maps that further assign individual zoning districts. SCC 3.20.020 is
17 applicable to *zoning reclassifications* not *land use designations*. Therefore, before any land
18 may be rezoned pursuant to SCC 3.20.020 it must first be re-designated to another land use
19 designation which would facilitate the proposed zoning district. This, as the County notes,
20 requires an amendment to the CP itself *prior to* the rezoning of the land and the application
21 of the correlating amendment process set forth in SCC 3.31 allowing for full public

22 ⁸² Stevens County Comprehensive Plan, Natural Resources Element, Part II – Section 3.0, Goal 3.1

23 ⁸³ Stevens County Comprehensive Plan,, Natural Resources Element, Part II – Section 3.0

24 ⁸⁴ *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, at 10 (March 14, 2006)(citing to
25 *Orton Farms v. Pierce County*, CPSGMHB Case No. 04-3-0007c, FDO (Aug. 2, 2004) which stated:

26 "...Since agricultural resource lands were identified and designated pursuant to the GMA's
criteria and requirements, it follows that the de-designation of such lands demands additional
evaluation and analysis to ascertain whether the GMA criteria and requirements are, or are
not, still applicable to the lands being changed. A rational process of evaluating objective
criteria is essential for designating or de-designating agricultural lands."

1 involvement in the planning decision. In addition, as the Board noted in Legal Issue 4, to
2 set forth the designation criteria for NRL within the County's CP protects the criteria from
3 being modified more than once a year, something that could occur if criteria was set forth
4 only in the development regulations.⁸⁵

5 Lastly, the Board would like to point out it is for the Petitioners to make and support
6 their assertions the challenged action violates the cited GMA provisions; it is not the Board's
7 responsibility to decipher and construct arguments from a party's brief. For Petitioners to
8 state simply the challenged action does not comply with the GMA, without citing to the
9 provision; stating what the provision requires, and setting forth argument comparing the
10 requirement to the challenged action is conclusory and does not satisfy the burden of proof
11 the Petitioners must carry in demonstrating the County's actions were clearly erroneous.

12 **Conclusion:**

13 The Board finds and concludes the Petitioners' have failed to demonstrate Stevens
14 County, with the adoption of Ordinance 2007-01 enacting Title 3 DRs, specifically SCC
15 3.20.020 in regards to rezones, fails to conserve NRL as provided for in RCW
16 36.70A.020(8). The Natural Resource Element of the CP sets forth designation criteria in
17 relationship to the GMA's requirements for NRL and SCC 3.20.020 requires a proposed
18 rezone to be consistent with the CP.

19 **Critical Area Protection, Surface and Ground Water Protection,**
20 **and Preservation of Rural Character**

21 **Issue No. 5:**

22 Does Title 3 fail to comply with the Growth Management Act, RCW 36.70A.070(1),
23 .070(5), RCW 36.70A.040, .030, .060, .172, RCW 36.70A.020(8-10) by providing for
24 protection of quality and quantity of ground water with review of drainage, flooding and
25 storm water run-off? Did the County fail to provide guidance for corrective actions to
26 mitigate or cleanse those discharges that pollute the waters of the state? Does this
substantially interfere with the Goals of the Act?

⁸⁵ See Legal Issue 4 – Citing to RCW 36.70A.130.

1 **Issue No. 8:**

2 Does Title 3 fail under RCW 36.70A.070 (5), .070(1), RCW 36.70A.110, and RCW
3 36.70A.040, RCW 36.70A.060, RCW 36.70A.172 to provide and protect the Rural character,
4 which limits development/uses/lot sizes at levels that are consistent with the rural
5 character, protect critical areas, conserve fish and wildlife habitat, protect surface water and
6 ground water resources, water quality and quantity, discharge areas, requiring land use –
7 developments that are compatible with wildlife fish and wildlife habitat(.030) Has Stevens
8 County in Title 3, as a development regulation, failed to use best available science in
9 protecting critical areas? Does this substantially interfere with the Goals of the Act? (#10,
10 #9,)

11 **Issue No. 11:**

12 Do the uses, lot sizes, densities allowed in Title 3 (including LAMIRDs) allow urban
13 development outside UGAs in violation of RCW 36.70A.110 fail to protect the rural
14 character, the environment, critical areas, water quality and quantity and natural resource
15 lands in violation of RCW 36.70A.020(1-2), RCW 36.70A.020(8-10) RCW 36.70A.020(12),
16 RCW 36.70A.040, RCW 36.70A.060, RCW 36.70A.070, RCW 36.70A.110 and RCW
17 36.70A.172 and .177? These uses, lot sizes and densities are found in chapters 3.02, 3.03,
18 3.04, 3.05, 3.06, 3.07, 3.11, 3.16, 3.20 but are not limited to those chapters. Does this
19 substantially interfere with the Goals of the Act?

20 ***Applicable Law, as set forth in the Issue Statements:***⁸⁶

- 21 RCW 36.70A.020(1), .020(2), .020(8), .020(9), .020(10), .020(12)
- 22 RCW 36.70A.030
- 23 RCW 36.70A.040
- 24 RCW 36.70A.060
- 25 RCW 36.70A.070(1), .070(5)
- 26 RCW 36.70A.110
- RCW 36.70A.172

21 ⁸⁶ Petitioners set forth a variety of GMA provisions within Legal Issues 5, 8, and 11; however, the Board notes
22 that in Petitioners’ HOM Brief they cite only to RCW 36.70A.020(10), 36.70A.030(15)(d), .030(15)(g),
23 36.70A.040(3), .040(4), 36.70A.070(1), and 36.70A.070(5) and failed to submit argument on how Title 3
24 violated any of the other cited provisions. It is for the Petitioners, not the Board, to set forth the argument as
25 to which provision of the GMA was allegedly violated and to how Title 3 violated the cited provision. Thus, any
26 alleged violation of these provisions of the GMA is deemed abandoned. The Board further notes Petitioners
cited to several WAC provisions, for example, at Page 9 of the HOM Brief, WAC 365-196-305(c) and -305(d)
are cited with an inference that the County violated these WAC provisions. However, none of the three issue
statements alleged a violation of the WAC, which serves only to provide recommendations for meeting the
requirements of the GMA, and as such violations of these provisions may not be raised.

1 RCW 36.70A.177

2 **The Parties' Position:**

3 **Petitioners LBN and Jeanie Wagenman:**

4 The Petitioners consolidated the above issues for the purpose of argument.⁸⁷ The
5 Petitioners argue Title 3 violates numerous provisions of the GMA which require the
6 protection of critical areas and ground and surface water because Title 3 is neither
7 consistent with the County's CP nor is it consistent with the GMA.⁸⁸ The Petitioners then
8 point to various provisions of the County's CP for which the Petitioners contend Title 3 fails
9 to implement.⁸⁹

10 In support of these assertions, the Petitioners argue it is "not enough for the County
11 to claim that critical areas are protected in Title 3 because the County's Critical Areas
12 Ordinance (CAO) Title 13, address critical areas and therefore nothing more is needed"
13 because the GMA requires the consideration of such things as storm water run-off, aquifer
14 recharge, wildlife habitat, impervious surfaces, and wetlands and such things need to be
15 addressed within Title 3.⁹⁰ The Petitioners focus on storm water management, impervious
16 surfaces, environmentally sensitive areas, wetlands, water quality, critical aquifer recharge
17 areas, modifications available with rezoning, and permitted uses.⁹¹

18 **Respondent Stevens County:**

19 ⁸⁷ Petitioners' HOM Brief, at 6.

20 ⁸⁸ Petitioners' HOM Brief, at 6-7.

21 ⁸⁹ Petitioners' HOM Brief, at 8

22 ⁹⁰ Petitioners' HOM Brief, at 8-9.

23 ⁹¹ Petitioners' HOM Brief, at 9-21. The Board notes Petitioners set forth a discussion on consistency at Pages
24 25-29 in regards to rural character as well as a discussion in regards to water limitations at Pages 29-38.
25 These sections follow a discussion pertaining to Legal Issue 10 (SEPA) and it is confusing to the Board
26 whether Petitioners were presenting this argument in relationship to Issue 10 or in conjunction with their
arguments for Legal Issues 5, 8, and 11 as Issue 11. As noted elsewhere in this decision, it is the duty and
responsibility of the Petitioners to set forth a clear and well-articulated presentation of their argument. It is
not the responsibility of the Board to piece together a disorganized brief, pulling arguments from one section
into another in order to ascertain whether the Petitioners carried their burden of proof. Simply put, if the
Board can't figure out which issue the Petitioners is arguing, the argument will be disregarded.

1 Stevens County reads the Petitioners argument as being whether the County, with
2 the adoption of Title 3, fails to provide appropriate protections for critical areas.⁹² The
3 County contends the Petitioners fail to recognize the CAO is the County's vehicle for
4 protecting critical areas and Title 3 specifically requires compliance with the CAO.⁹³ In
5 similar regards, Stevens County notes Title 3 requires all land use activities requiring a
6 storm water management plan to use the Department of Ecology's Manual as guidance and
7 comply with the County's SMP.⁹⁴

8 The County further asserts the Petitioners are alleging the County's zoning
9 designations, in particular the RA-5 Zone, are clearly erroneous and pose a threat to critical
10 areas but provide no evidence in that regard.⁹⁵ Stevens County goes on to note the GMA
11 requires the use of Best Available Science (BAS) for the adoption of critical areas
12 regulations, Title 3 does not need to duplicate the protections set forth in the CAO, and all
13 land use decision are expressly subject to the protections of the CAO.⁹⁶

Petitioners LBN and Jeanie Wagenman HOM Reply:

14 The Petitioners contend their argument extends beyond the protection of critical
15 areas to the protection of groundwater, with the quantity of water dependent on recharge
16 of a "watershed" which may extend beyond critical areas.⁹⁷ In addition, the Petitioners
17 argue their issues relate to the maintenance and protection of Stevens County's rural
18 character and rural densities need to be consistent with rural character, which includes
19 watersheds, aquifers, and critical areas.⁹⁸ The Petitioners assert the CAO and the County's
20 SMP do not analyze long-term cumulative impacts but reviews development on a project-
21 by-project basis and does not address land use, density, storm water, impervious surfaces,

22 ⁹² County's Response Brief, at 6

23 ⁹³ County's Response Brief, at 5-6.

24 ⁹⁴ County's Response Brief, at 6.

25 ⁹⁵ County's Response Brief, at 7

26 ⁹⁶ County's Response Brief, at 7-9

⁹⁷ Petitioners' Reply Brief, at 6

⁹⁸ Petitioners' Reply Brief, at 6-7

1 etc.⁹⁹

2 The Petitioners reiterate the arguments of the HOM Brief in regards to storm water,
3 CARAs, and rural character and, presents new argument in relationship to specific uses
4 permitted under Title 3.¹⁰⁰

5 **Board Analysis:**

6 The Board first notes the Petitioners' briefing was difficult, if not, at times,
7 impossible, to follow and understand or to know which component of an issue the
8 Petitioners were actually arguing. At times, the Petitioners alleged the County violated the
9 GMA yet failed to cite to which provision had been violated or, similarly, contend the GMA
10 requires a certain action yet failed to cite to the correlating provision. From their briefing,
11 the Board reads the Petitioners argument as two-fold, essentially that despite the
12 application of the CAO Title 13, DRs Title 3 must, in and of itself, address the protection of
13 critical areas; and the County has not addressed the protection of ground and surface
14 waters, and is failing to preserve rural character.

15 In addition, much of the Petitioners' claims in regards to inconsistency are based on
16 CP policies that were *not in place at the time of adoption of Ordinance 2007-01*. The
17 Board will not and did not attempt to discover a correlating provision – the Petitioners'
18 argument in this regard simply fails as this is their responsibility. As the Petitioners are well
19 aware,¹⁰¹ the GMA grants a presumption of validity to all legislative enactments and places
20 the burden on the Petitioners to demonstrate Stevens County's action was clearly erroneous
21 in view of the entire Record and in light of the goals and requirements of the GMA.¹⁰² This
22 is not an easy burden for a petitioner to meet; however, reliance on policies which were not
23 even in place at the time results in a definite failure to meet this burden. The Board
24 further notes much of the Petitioners' challenge amounts to a collateral challenge to the

25 ⁹⁹ Petitioner's Reply Brief, at 7-8

26 ¹⁰⁰ Petitioners' Reply Brief, at 8-23

¹⁰¹ The Board notes that although petitioners are *pro se*, they have experience before the Board – having raised several cases (*See e.g.* Case Nos. 01-1-0016, 03-1-0003, 03-1-0006c, 04-1-0010, 06-1-0009).

¹⁰² RCW 36.70A.320

1 SMP or the CAO by asserting these mechanisms fail to adequately address environmental
2 protections. These legislative enactments are not before the Board and such an attack will
3 not be permitted and will be disregarded.

4 Lastly, as noted *supra*, as to these three issues the Board sees no reference in the
5 Petitioners' arguments as to RCW 36.70A.020(1), .020(2), .020(8), .020(9), .020(12),
6 36.70A.060, 36.70A.110, and 36.70A.177 and, as such, any assertion in regards to
7 violations of these provisions are deemed abandoned.

8 • **Critical Areas Protection**

9 The GMA requires all counties and cities, whether or not planning under the Act, to
10 designate and protect critical areas.¹⁰³ Critical areas include the following areas and
11 ecosystems:¹⁰⁴

- 12 a. Wetlands;
- 13 b. Areas with critical recharging effect on aquifers used for potable water;
- 14 c. Fish and wildlife habitat conservation areas;
- 15 d. Frequently flooded areas; and
- 16 e. Geologically hazardous areas.

17 Of these areas, the GMA itself provides specific definitions only for wetlands¹⁰⁵ and
18 geologically hazardous areas.¹⁰⁶ However, in designating critical areas, cities and counties
19 "shall consider the guidelines" promulgated by Washington State's Community, Trade, and
20 Economic Development (CTED) in consultation with the Department of Ecology pursuant to
21 RCW 36.70A.050.¹⁰⁷ The guidelines are set forth in WAC 365-190-080 and provide further
22 definition and meaning to each critical areas, such as frequently flood areas should include,
23 at a minimum, the 100-year flood plain designations of Federal Emergency Management
24 Agency (FEMA) and the National Flood Insurance Program and fish and wildlife habitat
25 conservation areas include such areas as those with endangered, threatened, or sensitive
26

103 RCW 36.70A.170(1)(d), RCW 36.70A.040(3)(b)

104 RCW 36.70A.030(5)

105 RCW 36.70A.030(21)

106 RCW 36.70A.030(9) Geologically Hazardous Areas

107 RCW 36.70A.050(1), .050(3)

1 species or areas with commercial and recreational shellfish beds.¹⁰⁸

2 Here, the Petitioners do not overtly challenge the County's designation of critical
3 areas; rather it is the second requirement – adopting development regulations that protect
4 these areas – which Petitioners allege Stevens County has failed to do.

5 The GMA requires that once a city or county has appropriately designated critical
6 areas within their jurisdictions, they must adopt development regulations to protect
7 designated critical areas and are to include BAS when developing regulations to protect¹⁰⁹
8 all of the functions and values of the critical areas,¹¹⁰ with special consideration given to the
9 conservation or protection measures necessary to preserve or enhance anadromous
10 fisheries.¹¹¹ The Board notes not all regulations are intended to protect the critical areas
11 itself – rather some are intended to protect any future development from damage such as
12 development within flood plains or within seismic hazard areas.

13 The requirement for BAS has been previously articulated by the Courts, with counties
14 and cities required to include and substantively consider BAS but not necessarily follow BAS
15 if there is a reasoned justification for departure from the BAS.¹¹² Thus, it is clear the GMA

16 ¹⁰⁸ See e.g., WAC 195-190-080(3) Frequently Flooded areas, -080(5) Fish and Wildlife Habitat Areas

17 ¹⁰⁹ The GMA's requirement to "protect" critical areas has been clarified by the Supreme Court, most recently in
18 *Swinomish Indian Tribal Community, et al v. WWGMHB*, 161 Wn.2d 415, 430-31 (2007) in which the Court
19 stated:

20 ... the GMA's requirement to protect [critical areas] does not impose a corresponding requirement to enhance
21 [although it does permit it].

22 ¹¹⁰ *Whidbey Island Environment Action Network v. Island County*, 122 Wn. App. 156, 175 (2004) (Holding that
23 the GMA requires that the regulations for critical areas must protect all of the "functions and values" of those
24 designated areas.

25 ¹¹¹ RCW 36.70A.040(3)(b), 36.70A.060(2), 36.70A.172(1). See also, WAC 365-195-900 to -925 (Procedures
26 relating to the application of BAS)

¹¹² See e.g. *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824 (2005); *Swinomish Indian
Tribal Community, et al v. WWGMHB*, 161 Wn.2d 415 (2007), *HEAL v. CPSGMHB*, 96 Wn. App 922 (1999),
Whidbey Island Environment Action Network v. Island County, 122 Wn. App. 156 (2004) --with the Courts
noting:

1. The purpose of the BAS requirement is to ensure that critical areas regulations are not based on speculation and surmise, but on meaningful, reliable, relevant evidence.
2. BAS is essential to an accurate decision about what policies and regulations are necessary to mitigate the environmental effects of development.

1 has substantial requirements when actions might affect critical areas and, therefore, cities
2 and counties are required to (1) designate the mandatory categories of critical areas and
3 (2) adopt regulations to protect all of the function and values of the critical areas.

4 Before looking at the County's DRs, the Board notes there is one exception to the
5 GMA's rule requiring protection of critical areas – critical areas located within the jurisdiction
6 of the Shoreline Management Act. Recently, the Supreme Court, in *Futurewise, et al. v.*
7 *WWGMHB*, in addressing the question of whether the Legislature intended the GMA to apply
8 to critical areas in shorelines covered by a Shoreline Master Plan (SMP) until the
9 Department of Ecology has approved a new or updated SMP, the Court stated:¹¹³

10 [Citing ESHB 1933 (codified as RCW 36.70A.480)] "The legislature intends that
11 critical areas within the jurisdiction of the [SMA] shall be governed by the
12 [SMA] and that critical areas outside the jurisdiction of the [SMA] shall be
13 governed by the [GMA]." We hold that the legislature meant what it said.
14 Critical areas within the jurisdiction of the SMA are governed only by the SMA.

15 Therefore, the Board first notes the Petitioners' arguments in relationship to critical areas
16 within the shoreline jurisdiction¹¹⁴ are misplaced given the Supreme Court's recent
17 holding.¹¹⁵ In addition, the Board notes some of the Petitioners' arguments in regards to
18 shorelines border on a challenge to the SMP itself, such as the Petitioners' contention the

19 3. The GMA does not require a county or city to follow BAS; rather, it is required to "include" BAS in
20 its record. Thus, a county or city may depart from BAS if it provides a reasoned justification for
21 such a departure.

22 4. Evidence of BAS must be included in the record and must be considered substantively in the
23 development of critical areas policies and regulations.

24 ¹¹³ *Futurewise, et al. v. WWGMHB*, 162 Wn.2d 242, 244 – 45 (2008). The Board notes the tension created by
25 the Supreme Court's ruling in the *Futurewise* case, leaving the protection of critical areas within the shoreline
26 area to regulations which date back to the 1970s in some areas of the State. The Board recognizes that
27 Stevens County's Shoreline Master Program was last updated in 1999 so it should at least incorporate science
28 recently produced as to the protection of shorelines and critical areas associated with these areas.

29 ¹¹⁴ RCW 90.58.030(2) generally sets the jurisdiction of the SMA to include marine waters, rivers flowing at
30 greater than 20 cubic feet per second, lakes of greater than 20 acres, shorelines of statewide significance, and
31 those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from
32 the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from
33 such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which
34 are subject to the provisions of RCW 90.58.

35 ¹¹⁵ Petitioners HOM Brief, at 13-17 cites to LU/SMP-3, LU/SMP-4, and LU/SMP-8.

1 County has failed to identify "sensitive area shorelines" or "rare or fragile biological areas"
2 so as to afford these areas additional protection, has not provided a definition of
3 "necessary," the SMP does not have any development standards in regards to storm water,
4 or the County has inappropriately designated Loon Lake and Deer Lake as Suburban
5 Shorelines as opposed to Rural, Conservancy, or Natural Shorelines which would afford
6 more protection.¹¹⁶ As noted above, critical areas within the shoreline jurisdiction are to be
7 regulated pursuant to Stevens County's SMP, which is not before the Board and therefore
8 any assertions by the Petitioners the County's GMA-enacted regulations should currently
9 protect these areas is unsupported by both statute and case law.

10 Pursuant to the GMA, the County has adopted a CAO which is set forth in Title 13 of
11 the SCC.¹¹⁷ The CAO's purpose is clearly stated as being:¹¹⁸

12 *The purpose of this Title is to comply with the mandate of RCW Chapter*
13 *36.70A, the Growth Management Act, and to the extent required by said*
14 *chapter, to protect the public health, safety and general welfare by providing*
15 *reasonable and effective regulations to 1) conserve, protect and maintain the*
16 *functions and values of regulated critical areas, 2) to prevent harm to the*
17 *public health, safety and general welfare from potential hazards associated*
18 *with certain critical areas and 3) to support the overall goal of Washington*
19 *State to assure the protection of wetlands.*

20 *Critical areas, as defined in WAC 365-190-080, include wetlands, aquifer*
21 *recharge areas, fish and wildlife habitat conservation areas, frequently flooded*
22 *areas, and geologically hazardous areas. Wetlands, aquifer recharge and fish*
23 *and wildlife habitat areas are considered "critical" due to their value as a*
24 *public resource. Frequently flooded and geologically hazardous areas are*
25 *considered "critical" due to the potential hazards they present to public health,*
26 *safety and general welfare.*

The *purpose of this Title* is to:

¹¹⁶ Petitioners' HOM Brief, at 11, 13-14.

¹¹⁷ Because of its relationship to this matter, the Board, pursuant to WAC 242-02-660, takes official notice of SCC Title 13. The Board recognizes that the County's CAO is not the subject of the present challenge, but in order to make a ruling in this matter the Board must determine how Stevens County is satisfying the GMA's mandate to protect the function and values of critical areas.

¹¹⁸ SCC 13.00.010; SCC 13.00.020 (Emphasis added)

- *Classify, designate and protect critical areas,*
- *Promote innovative, efficient design of proposed land use and development activities,*
- *Assist in orderly development, limit incompatible uses, and when appropriate, guide development to more suitable areas.*

“Classifying and designating critical areas” does not necessarily imply a change in a landowner’s right to use his or her land. “Limiting incompatible uses” does not mean a prohibition of all development, but means governing new development(s) that could adversely affect designated critical areas.

This Title provides specific protection requirements for each category of critical areas. While preservation and protection of critical areas is of paramount importance, it is not the intent of this Title to totally prohibit alteration or impacts to critical areas or associated buffers. Rather, *this Title defines a process and protection requirements intended as a framework to manage the County's critical area lands responsibly,* while providing for reasonable and economically viable uses of private property.

With the CAO, Stevens County has set forth protection regulations for all five of the GMA’s defined critical areas – wetlands, critical aquifer recharge areas (CARAs), fish and wildlife habitat, frequently flooded areas, and geologically hazardous areas – and mandates that any development proposal is subject to, unless specifically exempted,¹¹⁹ review under the CAO and that unless the protection requirements of the CAO have been met, Stevens County *shall not grant approval* to a development proposal.¹²⁰ SCC 13.00.050 provides the definition of a “development proposal” to be:

Development proposal includes proposals that require approval under existing or subsequently adopted Stevens County regulations. This includes the following permits: Building, On-site sewage disposal system, Flood plain, Shoreline exemption or substantial development, Conditional use permit, Variance, Rezone, Short Plat or Long Plat.

¹¹⁹ Limited exemptions are set forth in SCC 13.30.020 but are still subject to the limitation that any disturbance in or adjacent to a critical area avoids or mitigates adverse impacts.

¹²⁰ SCC 13.00.030, SCC 13.10.010.

1 The CAO provides various regulations intended to protect critical areas, including the
2 classification of critical areas (i.e. category of wetlands or susceptibility of aquifers), with
3 protections provided through the establishment on minimum buffers, building setbacks,
4 limitation on uses (CARAs only), report requirements (i.e. hydrogeologic site evaluation or
5 wildlife habitat management plan), satisfaction of building or flood code provisions (i.e.
6 structural requirements for geological hazard areas), enforcement and review/appeal
7 provisions. However, as the Petitioners correctly note, the CAO does not assign zoning
8 densities or uses (which the limited exception of some uses sets forth in provisions
9 applicable to CARAs) or sets forth specific design standards (i.e. minimum lot sizes, lot
10 coverage, etc) that may assist in providing protection for the functions and values of the
11 critical areas.

12 In contrast, SCC Title 3 is adopted pursuant to both the GMA and the County's
13 authority granted by the Washington State Constitution and has many purposes in
14 relationship to the development of land within the County (Emphasis added):¹²¹

- 15 A. Protect the Constitutional rights of the Stevens County citizens;
- 16 B. Implement the Stevens County CP; and
- 17 C. Protect the public health, safety and welfare; and
- 18 D. Encourage the orderly development of land and harmonious groupings of
19 activities; and
- 20 E. *Minimize potential adverse environmental impacts associated with the
21 location, development or operation of particular land uses;* and
- 22 F. Encourage land use decision making in accordance with the applicable laws
23 of the State of Washington; and
- 24 G. Apply development regulations to reflect Stevens County's development
25 characteristics, traditions, values and administrative capabilities.

26 Title 3 provides the establishment of zoning districts, uses and densities, development and
design standards (i.e. setbacks, road classifications, parking requirements), including special
standards for certain types of development, such as Subdivisions, Master Planned Resorts,

¹²¹ SCC 3.01.010, 3.01.020

1 Accessory Dwelling Units, or Cluster Developments, permit review and approval criteria,
2 enforcements provisions, and SEPA compliance provisions. Title 3 applies to *all land uses*
3 *and development* authorized by the Title and requires compliance with all other Stevens
4 County regulations and/or applicable requirements of local, state or federal law.¹²² Title 3
5 specifically sets forth Environmental Performance Standards which include:¹²³

6 A. Critical Areas. *All land uses shall comply* with the requirements and
7 standards of the Stevens County Critical Areas Ordinance.

8 B. Shorelines. *All land use activities shall comply* with the requirements and
9 standards of the Stevens County Shoreline Management Master Program.

10 C. Noise. *Activities should meet* noise standards contained in WAC 173-60-040
11 as enforced by the Washington State Department of Ecology.

12 D. Storm water Management. *Should consider* the guidance regarding
13 technical design standards and best management practices recommended in
14 the Department of Ecology *Storm water Manual for Eastern Washington*
15 *(2004)*.

16 E. Services & Facilities. *Services and facilities shall be adequate* to serve the
17 intended use, and shall be consistent with any level of service standards for
18 urban or rural areas contained in the Stevens County Comprehensive Plan or
19 the provisions of this Title.

20 The crux of the Petitioners' argument is cited on Page 8-9 of their HOM brief and
21 provides (Emphasis in original):

22 It is simply not enough for the County to claim that critical areas are protected
23 in Title 3 because the [CAO, Title 13] addresses [critical areas] and therefore
24 nothing more is needed. Given the above language cited in Growth
25 Management Law, it is evident that consideration for surface water, storm
26 water runoff, water quality and quantity, recharge of watershed or aquifers,
flooding, compatibility with fish and wildlife and wildlife habitat ... all need to
be part of compliant GMA development regulations. Title 3 is Stevens
County's development regulations.

Title 13 (CAO, Critical Areas Ordinance) does not regulate densities, or type of
water-land uses or subdivide any section of land. Critical Areas including

122 SCC 3.01.030

123 SCC 3.04.020 (Emphasis added)

1 CARA (critical aquifer recharge areas), wetlands, watersheds,¹²⁴ floodplains,
2 fish and wildlife habitat and riparian areas are all impacted by what
3 developments are placed into these areas ... it is Title 3 that controls this
4 development or should control this development, providing some standards or
5 recognition of the limits of the land and water ...

6 In regards to critical areas, the Petitioners focus on the fact Title 3 doesn't address
7 impervious surfaces, storm water management, wetlands, and appropriate zoning and uses.
8 The Petitioners specifically cite to SCC 3.11, 3.16, 3.20, and reference the County's rural
9 zoning which allows for parcels of 1 du per 5 acres. The Board does not discount the
10 County's use of a CAO to protect critical areas from adverse impacts and pursuant to SCC
11 3.04.020, all designated critical areas will be considered during development application
12 review.¹²⁵ However, as noted *supra*, RCW 36.70A.060(2) requires the adoption of DRs that
13 protect designated critical areas and the Board does not see a CAO as the only regulation
14 which serves to protect critical areas. DRs Title 3 can be utilized to amplify protections set
15 forth in a jurisdiction's CAO by setting forth simple design standards, such as those
16 suggested by the Petitioners – limitations on impervious coverage and consideration of
17 storm water runoff. In fact, one of Title 3's stated purposes is to "minimize potential
18 adverse environmental impacts associated with the location, development or operation of

19 ¹²⁴ The Board notes that Petitioners have merged the word "watershed" into their arguments pertaining to
20 critical areas. By the GMA's own terms, a watershed is not a critical area. Rather, in basic terms, a watershed
21 is all the land that drains to the same body of water, such as a lake or river, with smaller watersheds
22 becoming part of larger watersheds as streams feed into rivers and rivers flow into lakes or oceans. In
23 essence, every square inch of land is within a watershed. In Washington, the Legislature enacted the
24 Watershed Planning Act, RCW 90.82, to set a framework for developing local solutions to watershed issues
25 with a requirement in regards to water quantity and optional components as to water quality, habitat, and in-
26 stream flow and has segregated the State into 62 Water Resource Inventory Areas (WRIAs). Thus, if
27 Petitioners' argument was based on GMA requirements as to critical areas, any reference to a watershed is not
28 incorporated in the Board's decision.

¹²⁵ Petitioners appear to contend that just because a specific critical area is not addressed within Title 3, that
the County is not required to give the critical area consideration. *See e.g.* Petitioners' HOM Brief, at 14 stating:
"Nowhere in Title 3 is there any consideration for wetlands. There are no standards and no criteria for
development in these sensitive areas." However, Title 13 does establish buffer and mitigation requirements,
and as such, set some standards and criteria.

1 particular land uses¹²⁶ and therefore provides for the furtherance of the CAO's protection
2 mechanisms.

3 With the exception of provisions relating to the expansion of non-conforming uses,
4 the CAO does not address impervious surfaces,¹²⁷ nor, with the exception of noting one of
5 the beneficial functions of wetlands is storm water control,¹²⁸ does the CAO address storm
6 water run-off itself. Therefore, these aspects of environmental protection are left to other
7 DRs. Within Title 3, despite setting forth a definition of impervious,¹²⁹ the term is only
8 present in regards to the expansion of non-conforming uses.¹³⁰ The Petitioners submit
9 evidence as to the impacts of impervious coverage on critical areas, in particular on the
10 ability of a CARA to properly recharge.¹³¹ Although the Petitioners state BAS indicates
11 impervious surface in excess of 10 percent results in impacts, this figure is in relationship to
12 the "overall imperviousness within a watershed" and not necessarily applicable at a site
13 level.¹³² Setting limitations for impervious surface within SCC 3.11 Subdivisions and 3.16
14 Short Subdivisions, the design standard sections specifically addressed by the Petitioners, is
15 a nominal and easily accomplished amendment that will serve in providing protections to
16 the functions and values of critical areas throughout Stevens County, especially in
17 relationship to CARAs.

18 As for the application of storm water discharge controls, with the exception of Master
19 Planned Resorts, Binding Site Plans, and Development Agreements which all require the
20 provision/inclusion of facilities, the consideration of storm water discharge is limited to
21 UGAs.¹³³ It is common knowledge storm water discharges, carrying both natural (silt,
22 sediment, etc) and man-made (oils, chemicals, etc) pollutants can adversely impact the

21 ¹²⁶ SCC 3.01.020(E)

22 ¹²⁷ See SCC 13.10.020(2)

23 ¹²⁸ See SCC 13.20.041.

24 ¹²⁹ See SCC 3.90, Definitions

25 ¹³⁰ See SCC 3.06.060

26 ¹³¹ Petitioners' Exhibit 3, at 6; Exhibit 4C; Exhibit 4D.

¹³² Petitioners' Exhibit 3, at 6-7

¹³³ See SCC 3.11.236 Subdivision Design Standards UGA; 3.16.236 Short Subdivision Design Standards UGA;
SCC 3.05.030 Master Planned Resorts; 3.17.040 Binding Site Plans; 3.20.060 Development Agreements.

1 chemistry of a critical area. Although the Board recognizes the method of storm water
2 control within the rural area will differ from that of the UGA, the consideration of storm
3 water discharge resulting from a development proposal should, at a minimum, be
4 considered within the development review process so as to ascertain whether increases in
5 discharge resulting from the development would adversely impact critical areas. The Board
6 further recognizes not all development proposals within areas outside of the UGAs would
7 result in storm water issues; however, some types, such as cluster developments, may
8 necessitate the provision of some type of controls given the compact nature of such
9 developments. As with impervious surface, the Board finds inclusion of the consideration of
10 storm water discharge with SCC 3.11 Subdivisions and SCC 3.16 Short Subdivisions is a
11 nominal amendment that will serve in protecting the function and value of critical areas
12 throughout Stevens County.

13 With Issue 11, the Petitioners challenge the “uses, lot sizes, densities allowed in Title
14 3 (including LAMIRDs)” but, with the exception of contending that permitting rural densities
15 as low as 1 du/5 acres will adversely impact critical areas and water supplies, and
16 superficially citing to the County’s Use Tables,¹³⁴ little more is provided to the Board.¹³⁵
17 The crux of the argument appears to be the Petitioners desire to have greater zoning within
18 critical areas, apparently disputing the County’s use of zoning as low as 5 acres. But, the
19 Petitioners fail to recognize their own evidence denotes low-density development may not
20 always be the preferred strategy for protecting water resources because denser
21 development consumes less land resulting in less storm water runoff per residential unit and
22 less impervious coverage.¹³⁶ As required under the GMA, the County has provided for a
23 variety of rural densities – ranging from 1 du/5 acres to 1 du/20 acres – and has
24 determined the appropriate location for these zones. The Record clearly sets forth the issue

25 ¹³⁴ Petitioners attached tables adopted in February 2008. For the purpose of this decision, the Board review Title 3’s use
26 tables - SCC 3.03.020 to 3.03.090 – as adopted by Ordinance 2007-01.

¹³⁵ The Board notes that arguments as to specific uses, such as within LAMIRDs, salvage yards within a CARA,
industrial uses, etc. where raised in the reply brief.

¹³⁶ Petitioners’ Exhibit 3, at 1.

1 of appropriate zoning in regards to critical areas was before the County and the BOCC
2 determined, based on the facts presented, what the appropriate zoning district for each
3 area was.¹³⁷ Although it is evident the Petitioners would have selected a higher zoning
4 density, they have failed to demonstrate the County's actions in applying a variety of rural
5 densities, given the application of the County's CAO, is clearly erroneous and fails to
6 consider the GMA's requirements to protect the functions and values of critical areas.

7 In addition, by their arguments, it appears the Petitioners fail to recognize just
8 because a use is "permitted" it is not subject to review by the appropriate County
9 departments, including Land Services, Public Works, and Health, and is subject to
10 conformance with all local ordinances, such as the CAO and SMP, as well as state and
11 federal laws which restrict development *within* a critical area, such as a wetland.¹³⁸ The
12 Petitioners also contend Title 3, with clustering provisions of SCC 3.06.040, does not
13 encourage clustering to occur away from, as opposed to within, wetlands.¹³⁹ However, the
14 Petitioners further fail to recognize not only that Stevens County's CAO sets forth an
15 avoidance of impacts scheme as the primary method of protection critical areas,¹⁴⁰ but the
16 application of other laws and regulations as noted above.

17 **Conclusion – Critical Areas:**

18 The Petitioners have demonstrated, in part, Stevens County is not protecting critical
19 areas as required by the GMA pursuant to RCW 36.70A.060, .172, .020(9), and .020(10) by
20 enacting design standard development regulations, SCC 3.11 Subdivisions and SCC 3.16
21 Short Subdivisions which protect all of the functions and values of critical areas. Although

22 ¹³⁷ See e.g. Petitioners' Exhibits 8J, 14F, 15A, 15B, and 15C

23 ¹³⁸ Federal, State, and Local governments may all have specific permit requirements. At the Federal level, the Army
24 Corps of Engineers regulates wetlands under the Clean Water Act and Coastal Zone Management Act. Aspects of this
25 authority have been delegated to Washington's Department of Ecology. Washington State agencies regulate wetlands
26 under the Hydraulic Code, State Water Pollution Control Act, Shoreline Management Act, and the Forest Practices Act.
Local governments such as the County or City, regulate wetlands under the Growth Management Act and the Shoreline
Management Act.

¹³⁹ Petitioners' HOM Brief, at 16.

¹⁴⁰ SCC 13.20.020(3) – proposals are to first AVOID, the impact. After that, impacts are to be MINIMIZED,
RESTORED, REDUCED, or COMPENSATED.

1 the Petitioners' challenge is to the County's adoption of Title 3 Development Regulations,
2 which are not the primary regulatory mechanism by which the County is protecting the
3 functions and values of the five mandatory categories of critical areas, serves an ancillary
4 purpose by further amplifying the protections of the CAO. The Petitioners have set forth
5 specific argument as to storm water control and impervious coverage and the Board sees
6 the consideration of these development related impacts as minor modifications Stevens
7 County can easily remedy upon remand. The maximum permissible impervious coverage
8 and the methods for addressing storm water controls are at the County's discretion.

9 As for zoning and uses, the Board finds and concludes the Petitioners' have failed to
10 demonstrate Title 3, which assigns a variety of rural densities, ranging from 1 du/5 acre to
11 1 du/20 acre, would adversely impact critical areas. In addition, the Petitioners' have failed
12 to demonstrate that uses permitted to occur within rural areas, subject to review and
13 compliance with all federal, state, and local laws and regulations, including the CAO and
14 SMP, and given Stevens County's "avoidance of impacts" scheme, fails to protect the
15 function and values of designated critical areas.

16 The Petitioners must recognize the GMA does not preclude development in
17 relationship to critical areas; it seeks to protect the functions and values of those critical
18 areas based on best available science. If a critical area's functions and values can be
19 protected while still permitting development to occur, nothing in the GMA prohibits such
20 development.

21 • **Surface and Ground Water**

22 Much of the Petitioners argument in regard to surface and ground water relates to
23 "watershed" impacts, which as noted *supra*, is not a critical area for which Stevens County
24 is required to have development regulations to protect the functions and values.

25 The Board further notes with Issue 5, the Petitioners assert Title 3 fails to comply
26 with the GMA because it does not provide protection of ground water by reviewing
drainage, flooding or stormwater nor did the County provide guidance for corrective actions
to mitigate or cleanse discharges that pollute waters of the State. Although the Petitioners

1 cite to a variety of GMA provisions within this issue statement, the language noted is
2 derived from RCW 36.70A.070(1) which provides, in relevant part (emphasis added):

3 ...Where applicable, the *land use element shall review* drainage, flooding, and
4 storm water run-off in the area and nearby jurisdictions and *provide guidance*
5 for corrective actions to mitigate or cleanse those discharges that pollute
6 waters of the state...

7 Thus, the language relied on by the Petitioners stems from a requirement that review and
8 guidance be set for in the County's *Land Use Element* which is a component of the
9 *Comprehensive Plan*. The County's CP is not before the Board; the challenge raised by
10 Petitioners is to Title 3 – the Development Regulations. Therefore, the Petitioners'
11 assertions based on the GMA's requirements in this regard are inappropriate.

12 As to the limitation on uses and lot sizes, the Petitioners are essentially asserting
13 Stevens County should preclude development until such time as "water limitations" can be
14 addressed or to increase zoning within certain areas, namely Loon Lake, in order to address
15 water limitations. Once again, the Petitioners fail to recognize SCC 3.20.035 requires that
16 prior to approval of a subdivision, the applicant must demonstrate adequate provision of
17 potable water supplies as well as SCC 3.04.020(E)'s requirement as to the adequacy of
18 public facilities, which would include the provision of water. As such, Title 3 incorporates the
19 consideration of water supplies during the development application review process. In
20 addition, the Petitioners cite to a variety of exhibits which demonstrate the issue of potable
21 water resources was before the County Commissioners¹⁴¹ and the Commissioners,
22 exercising the discretion afforded them by the GMA, made a determination the application
23 of rural zoning and the application of Title 3's restrictive limitations in conjunction with the
24 County's CAO would address these concerns; apparently in juxtaposition to comments
25 submitted by the Petitioners. Although the GMA provides for enhanced public participation,
26 this does not equate to "citizens decide," rather the final determination is vested in the
County's elected officials.

¹⁴¹ Petitioners' HOM Brief, at 30-31.

1 The remaining assertions of the Petitioners' in regards to surface and ground water
2 appear to relate to the protection of the rural character or to assertions that Stevens County
3 should limit uses and lot sizes in order to protect water quantity and quality. In
4 relationship to rural character, this will be addressed below.

4 **Conclusion – Surface and Ground Water:**

5 Therefore, the Board finds and concludes the Petitioners had failed to demonstrate
6 Stevens County, with the enactment of Ordinance 2007-01, adopting Title 3, has failed to
7 consider the surface and ground water resources. In addition to setting a variety of rural
8 densities to ensure low-density development, the County has enacted provisions, SCC
9 3.20.035 and SCC 3.04.020(E), which require the adequate provision of water supplies to
10 proposed developments.

11 • **Preservation of Rural Character**

12 The GMA, pursuant to RCW 36.70A.011, provides:

13 The Legislature ... recognize[s] the importance of rural lands and rural
14 character to Washington's economy, its people, and its environment, while
15 respecting regional differences.

15 The Legislature further stated:¹⁴²

16 [T]hat in defining its rural element under RCW 36.70A.070(5), a county should
17 foster land use patterns and develop a local vision of *rural character* that will:
18 Help preserve rural-based economies and traditional rural lifestyles; encourage
19 the economic prosperity of rural residents; foster opportunities for small-scale,
20 rural-based employment and self-employment; permit the operation of rural-
21 based agricultural, commercial, recreational, and tourist businesses that are
22 consistent with existing and planned land use patters; be compatible with the
23 use of the land by wildlife and for fish and wildlife habitat; foster the private
24 stewardship of the land and preservation of open space; and enhance the
25 rural sense of community and quality of life.

23 Finally, the GMA provides for a definition of "Rural character":¹⁴³

24 ¹⁴² RCW 36.70A.011

25 ¹⁴³ RCW 36.70A.030(15).

1 "Rural character" refers to the patterns of land use and development
2 established by a county in the rural element of its comprehensive plan:

3 (a) In which open space, the natural landscape, and vegetation predominate
4 over the built environment;

5 (b) That foster traditional rural lifestyles, rural-based economies, and
6 opportunities to both live and work in rural areas;

7 (c) That provide visual landscapes that are traditionally found in rural areas
8 and communities;

9 (d) That are compatible with the use of the land by wildlife and for fish and
10 wildlife habitat;

11 (e) That reduce the inappropriate conversion of undeveloped land into
12 sprawling, low-density development;

13 (f) That generally do not require the extension of urban governmental
14 services; and

15 (g) That are consistent with the protection of natural surface water flows and
16 groundwater and surface water recharge and discharge areas.

17 The Petitioners' primary concern appears to be based on RCW 36.70A.070(5)(c)'s
18 requirement to protect "... surface water and groundwater resources ... with measures that
19 apply to rural development and protect the rural character as well as (iv) "protecting critical
20 areas,...surface water and ground water resources."¹⁴⁴ The Petitioners also point to *Rural*
21 *Development*, WAC 365-195-330 2(ii)(d)(i) and RCW 36.70A.030(16) to support their
22 assertions.¹⁴⁵ These provisions of the GMA refer to development outside the UGA and
23 outside designated natural resource lands, pursuant to RCW 30.70A.170. The Petitioners
24 allege Title 3 fails to comply with the GMA, lacks consistency, and would allow "total
25 development of wetlands."¹⁴⁶

26 The County replies the Petitioners' arguments "reflects Petitioners refusal to accept
that the County's CAO (Title 13) is a GMA compliant development regulation adopted to
designate and protect critical areas."¹⁴⁷ The County asserts Title 3 requires "All land uses

¹⁴⁴ Petitioners' HOM Brief, at 6.

¹⁴⁵ Petitioners' HOM Brief, at 7

¹⁴⁶ Petitioners' HOM Brief, at 17.

¹⁴⁷ County's Response Brief, at 6

1 shall comply with the requirements and standards of the Stevens County CAO.”¹⁴⁸ The
2 County notes every land use proposal goes through a critical areas review for compliance
3 with Title 13, which mandates GMA compliant protections for wetlands and all other critical
4 areas in Stevens County. The County further notes Stevens County chose to combine these
5 under a single title for ease of administration, and shows the county presents a good
6 example of wisdom because the County is able to state the requirement for compliance with
7 Title 13 and the County’s Shoreline Master Program (SMP) in one set of performance
8 standards that apply equally to all facets of land use, instead of having to repeat the
9 requirements in numerous separate titles.¹⁴⁹

9 The Petitioners also allege most of the areas in the Sheep Creek CARA that are
10 considered “susceptible” are given a RA-5 zone. The County states this assertion is both
11 incorrect and unsupported by evidence in the record, because when the Petitioners’
12 Attachment 8B and C (the Sheep Creek CARA) is laid over the County’s zoning map, it
13 shows less than 30% of the CARA is zoned Rural-5, which allows a potential 5 acre
14 density.¹⁵⁰ According to the County, more than 35% of the Sheep Creek CARA is designated
15 as Forest Land which allows a density no greater than one dwelling unit (DU) per 20 acres
16 and nearly 64% of the CARA allows a maximum density of no more than one DU/10 acres,
17 with over half of that area at a maximum density of one DU/20 acres.¹⁵¹ Stevens County
18 has zoned less than 1/3 of the Sheep Creek CARA at five-acre densities and it is well
19 established that a five-acre lot size is a “decidedly rural density.”¹⁵² The County further
20 argues, contrary to the Petitioners’ argument, a CARA designation does not prohibit
21 development, it merely establishes criteria for review and possible mitigation for certain
22 uses, and those requirements are established in Title 13, which is not subject to review in

23 ¹⁴⁸ HOM Reply Brief at 6 (citing to SCC 3.04.020)

24 ¹⁴⁹ County Response Brief, at 6-9.

25 ¹⁵⁰ County Response Brief, at 7 (citing to Tab C, (Map prepared by County GIS Department for illustration purposes.))

26 ¹⁵¹ County Response Brief, at 7

¹⁵² See *e.g. WEAN v. Island County*, 118 wn.App.567,580,76 P.3d 1215 (2003).

1 this case. In the Petitioners' HOM Reply Brief they once again reiterate their concerns about
2 the potential for groundwater contamination under the County's CAO Title 13, which is not
3 before this Board.

4 As noted elsewhere in this decision, the Petitioners have merged several concerns
5 under the heading of rural character with a linkage between zoning and critical areas to the
6 rural character. However, as noted, Stevens County has provided for a variety of rural
7 densities within the County's rural areas – ranging from 1 du/5 acres to 1 du/20 acre – all
8 of which are rural in nature and therefore promote rural character. The Board recognizes
9 the use of clustering provisions, as provided by RCW 36.70A.070(5)(b), appears denser
10 when viewed in isolation, but because such developments are required to maintain the
11 underlying density it is nonetheless a rural density when viewed in the context of the entire
12 parcel; therefore, preserving rural character and open space. Thus, the Board finds no
13 violation of the GMA in regards to the preservation of rural character as all zoning districts
14 are rural in nature. As with Legal Issues 9 and 11 in regards to NRL, the Petitioners
15 contend the County's rezone provisions, SCC 3.20.020, fail to protect the County's Rural
16 Character. The Board's rational supporting SCC 3.20.020 is provided *supra* and is applicable
17 to the Petitioners' contention. Furthermore, the rezone provisions would not permit urban
18 densities within the rural area – rezones must facilitate the underlying land use designation
19 with a rural land use designation only supporting a rural zoning district.

20 The Petitioners also contend that by failing to protect critical areas the County is
21 failing to preserve rural character because critical areas are, in fact, part of the character of
22 a rural area.¹⁵³ Although the Board does not disagree, lakes, streams, and wetlands are
23 visual elements within the rural area, these natural features are not exclusively found in the
24 rural area as critical areas are found within urban areas as well.

25 Lastly, the Petitioners set forth a disconnected section of their briefing alleging Title 3
26 is inconsistent with various comprehensive planning policies, citing erroneously to the 2008

¹⁵³ Petitioners' HOM at 28.

1 CP.¹⁵⁴ As noted elsewhere in this decision, it is not the Board's role to determine if these
2 erroneous provisions actually existed in the CP which was effective at the time of adoption
3 of Ordinance 2007-01 or, if they did exist, whether the language is parallel. The Petitioners
4 are required to correctly cite to provisions and to provide argument contrasting that
5 provision with the development regulation which is allegedly inconsistent. This, the
6 Petitioners failed to do and, as such, they have failed to support any claim of inconsistency.

Conclusion – Rural Character:

7 The Petitioners did not carry their burden of proof in demonstrating Stevens County
8 has failed to protect Rural Character as required by the GMA, RCW 36.70A.070(5), and as
9 argued in Issues 8 and 11. While the Petitioners made reference to "rural character" it was
10 difficult for the Board to distinguish between the Petitioners' concerns for "rural character"
11 as it relates to a variety of rural densities or their primary concern of critical area protection,
12 specifically stormwater discharge, and surface and ground water protection. Although the
13 Board does not discount the Petitioners' concerns for potential "substantial" environmental
14 risk to the quality and quantity of water in Stevens County should certain types of
15 development occur; once again, the Board would point out it is Stevens County's
16 Development Regulations, Title 3 which are being challenged and before the Board, not the
17 CAO, Title 13.

Invalidity

18 Within their PFR and briefing, the Petitioners request that the Board invalidate those
19 portions of Title 3, or in the alternative, Title 3 in its entirety, as the provisions substantially
20 interfere with the goals of the GMA, specifically Goals 2, 8, and 10. Within the Petitioners'
21 Reply brief they specifically requested the following provisions be held invalid - SCC 3.11
22 Subdivisions and SCC 3.16 Short Subdivisions, SCC 3.20.020 Rezone Classification.¹⁵⁵

24 ¹⁵⁴ Petitioners' HOM, at 25

25 ¹⁵⁵ Petitioners' Reply, at 33.

1 In the discussion of the Legal Issues in this case, the Board found and concluded
2 that with limited exceptions, the Petitioners' failed to demonstrate Steven County's adoption
3 of Ordinance No. 2007-01 was clearly erroneous. Although the Board did find the Ordinance
4 was non-compliant with the GMA's requirements in regard to critical area protection as to
5 the application of impervious surface coverage limitation and the consideration of
6 stormwater discharges, the Board did not conclude that these violations were egregious.
7 The Board is remanding Ordinance No. 2007-01 with direction to the County to take
8 legislative action to comply with the goals and requirements of the GMA as set forth in this
9 Order.

10 A Board may enter an order of invalidity upon a determination that the continued
11 validity of a non-compliant city or county enactment substantially interferes with fulfillment
12 of the goals of the GMA. RCW 36.70A.302(1)(b). As set forth in the findings and conclusions
13 below, Stevens County's enactment of Ordinance No. 2007-01, which adopts Title 3
14 Development Regulations, does not substantially interfere with the goals of the GMA and,
15 therefore, **Petitioners' request for invalidity is DENIED.**

16 CONCLUSION

17 As noted within this Final Decision and Order, the Board finds and concludes the
18 Petitioners have abandoned Legal Issues 1, 2, 3, 6, 7, and 12; the Petitioners failed to
19 exhaust administrative remedies and as such are barred from raising issues related to SEPA
20 as set forth in Legal Issues 10; the Petitioners failed to carry their burden of proof in
21 demonstrating Stevens County violated the GMA's concurrency goal, RCW 36.70A.020(12),
22 as set forth in Legal Issue 4; the Petitioners failed to carry their burden of proof in
23 demonstrating Stevens County violated the GMA's mandate in regard to the maintenance
24 and enhancement of natural resource lands, RCW 36.70A.020(8) and RCW 36.70A.170, as
25 set forth in Legal Issues 9 and 11; the Petitioners have failed to carry their burden of proof
26 in demonstrating Stevens County violated the GMA's requirement, RCW 36.70A.070(5), to
preserve rural character as set forth in Legal Issues 8 and 11; and the Petitioners' failed to

1 carry their burden of proof in demonstrating Stevens County violated the GMA's
2 requirements in regards to surface and ground water protection.

3 However, as noted within this Final Decision and Order, the Board finds and
4 concludes the Petitioners have demonstrated Stevens County's Title 3 Development
5 Regulations fails to address impervious surface and stormwater discharge in regards to
6 critical areas protection and, as such, violates RCW 36.70A.060 and .172 which requires
7 development regulations to protect all of the functions and values of critical areas. **The**
8 **Board REMANDS Stevens County Code Sections 3.11 Subdivisions and 3.16 Short**
9 **Subdivisions, to take legislative action in regards to impervious surface coverage**
10 **throughout the County and the consideration of stormwater discharge within the**
11 **rural area.**

11 VII. FINDINGS OF FACT

- 12 1. Stevens County is a county located East of the crest of the Cascade
13 Mountains and opted to plan under the GMA and is therefore required
14 to plan pursuant to RCW 36.70A.040.
- 15 2. On December 23, 2005, Stevens County issued an Integrated Final
16 Environmental Impact Statement (FEIS) relating to its GMA
17 Development Regulations. Petitioners failed to file an administrative
18 appeal of the FEIS.
- 19 3. On July 2, 2007, Stevens County adopted Resolution 2007-01 adopting
20 Stevens County Code Title 3 and repealing previously enacted Stevens
21 County Resolutions and Ordinances.
- 22 4. On, September 10, 2007, Petitioners filed a Petition for Review in this
23 matter.
- 24 5. Petitioners have standing based on participation as provided for in RCW
25 36.70A.280(2)(b).
- 26 6. Legal Issues 1, 2, 3, 6, 7, and 12 have been abandoned by the
Petitioners.

- 1 7. The County's Development Regulations specifically provide for the
2 adequacy of public facilities and services in relationship to the proposed
3 development and in consistency with any adopted LOS standard.
- 4 8. Stevens County Code Title 3 (Ordinance 2007-01) complies with the
5 GMA's concurrency requirements for public facilities and services as set
6 forth in RCW 36.70A.020(12).
- 7 9. Stevens County has previously adopted a Critical Areas Ordinance
8 which is codified in Title 13 of the Stevens County Code.
- 9 10. There is substantial evidence in the record to support a determination
10 that Stevens County has adopted Comprehensive Plan provisions and
11 Development Regulations that designate and protect Critical Areas.
- 12 11. The County's adoption of Title 3 Development Regulations, which are
13 not the primary regulatory mechanism by which the County is
14 protecting the functions and values of the five mandatory categories of
15 critical areas, serves an ancillary protection purpose by further
16 amplifying the protections of the CAO.
- 17 12. Stevens County is not protecting critical areas as required by the GMA
18 pursuant to RCW 36.70A.060, .172, .020(9), and .020(10) by enacting
19 design standard development regulations, SCC 3.11 Subdivisions and
20 SCC 3.16 Short Subdivisions which protect all of the functions and
21 values of critical areas.
- 22 13. As for zoning and uses, the Petitioners' have failed to demonstrate Title
23 3, which assigns a variety of rural densities, ranging from 1 du/5 acre
24 to 1 du/20 acre, would adversely impact critical areas. In addition, the
25 Petitioners' have failed to demonstrate that Title 3 does not protect the
26 functions and values of designated critical areas by permitting uses
permitted to occur within rural areas, subject to review and compliance
with all federal, state, and local laws and regulations, including the CAO
and SMP, and given Stevens County's "avoidance of impacts" scheme.
14. Petitioners failed to demonstrate Stevens County, with the enactment
of Ordinance 2007-01, adopting Title 3, has failed to consider the
surface and ground water resources. In addition to setting a variety of
rural densities to ensure low-density development, the County has

1 enacted provisions, SCC 3.20.035 and SCC 3.04.020(E), which require
2 the adequate provision of water supplies to proposed developments.

3 15. In relationship to the GMA's requirements for NRL, Stevens County
4 Code Section 3.20.020 requires a proposed rezone be consistent with
5 the Comprehensive Plan.

6 16. The Petitioners did not carry their burden of proof in demonstrating
7 Stevens County has failed to protect Rural Character as required by the
8 GMA, RCW 36.70A.070(5), and as argued in Issues 8 and 11.

9 **VIII. CONCLUSIONS OF LAW**

10 1. This Board has jurisdiction over the parties to this action.

11 2. This Board has jurisdiction over the subject matter of this action.

12 3. Petitioners have standing to raise the issues raised in the Petition for
13 Review based upon participation as provided for in RCW
14 36.70A.280(2)(b).

15 4. The Petition for Review in this case was timely filed.

16 5. Stevens County is a county located East of the crest of the Cascade
17 Mountains and opted to plan under the GMA and is therefore required
18 to plan pursuant to RCW 36.70A.040.

19 6. On December 23, 2005, Stevens County issued an Integrated Final
20 Environmental Impact Statement (FEIS) relating to its GMA
21 Development Regulations.

22 7. Petitioners failed to exhaust administrative remedies available to them
23 under the Stevens County Code and are barred from challenging the
24 adequacy the environmental review contained within the December
25 2005 FEIS that served as the basis of the adoption of Ordinance 2007-
26 01 which amended Stevens County Code Title 3.

Stevens County Code Title 3 (Ordinance 2007-01) complies with the
GMA's concurrency requirements for public facilities and services as set
forth in RCW 36.70A.020(12) and 36.70A.070(3).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- 9. On July 2, 2007, Stevens County adopted Resolution 2007-01 adopting Stevens County Code Title 3 and repealing previously enacted Stevens County Resolutions and Ordinances.
- 10. Stevens County is not protecting Critical Areas as required by the GMA pursuant to RCW 36.70A.060, .172, .020(9), and .020(10) by enacting design standard development regulations, SCC 3.11 Subdivisions and SCC 3.16 Short Subdivisions which protect all of the functions and values of critical areas, and Ordinance 2007-1 is non-compliant with the GMA's requirements in regard to critical area protection as to the application of impervious surface coverage limitation and the consideration of stormwater discharges.
- 11. As for zoning and uses, there is substantial evidence in the record to support a determination that Title 3, which assigns a variety of rural densities, ranging from 1 du/5 acre to 1 du/20 acre, would not adversely impact critical areas. In addition, there is substantial evidence in the record to support a determination that Title 3 does protect the functions and values of designated critical areas by permitting uses to occur within rural areas, subject to review and compliance with all federal, state, and local laws and regulations, including the CAO and SMP, and given Stevens County's "avoidance of impacts" scheme.
- 12. There is substantial evidence in the record to support a determination that Stevens County, with the enactment of Ordinance 2007-01, adopting Title 3, has considered the surface and ground water resources, and that the County has enacted provisions, SCC 3.20.035 and SCC 3.04.020(E), which require the adequate provision of water supplies to proposed developments.
- 13. Stevens County is protecting Natural Resource Lands as required by the GMA pursuant to RCW 36.70A.040, .060, .170, .020(8), and .020(10).
- 14. There is substantial evidence in the record to support a determination that Stevens County has protected Rural Character as required by the GMA, RCW 36.70A.070(5), and as argued in Issues 8 and 11.

IX. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

1. Pursuant to WAC 242-02-570-(1), failure of a party to brief an issue constitutes abandonment of the unbriefed issue. Petitioners have failed to brief Legal Issues 1, 2, 3, 6, 7, and 12 and therefore have abandoned claims raised by these Legal Issues. Legal Issues 1, 2, 3, 6, 7, and 12 are **DISMISSED** in their entirety.
2. Petitioners have failed to exhaust administrative remedies available through Stevens County Code and are therefore barred from raising issues related to SEPA as set forth in Legal Issue 10. Legal Issue 10 is **DISMISSED** in its entirety.
3. Petitioners have failed to carry their burden of proof with respect to Legal Issue 4, challenging Stevens County's enactment of Ordinance 2007-01, adopting Title 3 Development Regulations, in relationship to concurrency for public facilities and services, that the County's action was clearly erroneous and failed to comply with RCW 36.70A.020(12). Legal Issue 4 is **DISMISSED**.
4. Petitioners have failed to carry their burden of proof with respect to Legal Issues 9 and 11, challenging Stevens County's enactment of Ordinance 2007-01, adopting Title 3 Development Regulations, in relationship to natural resource lands, that the County's action was clearly erroneous and failed to comply with RCW 36.70A.020(8) and 36.70A.170. Legal Issues 9 and 11, as they relate to natural resource lands, are **DISMISSED**.
5. Petitioners have carried their burden of proof with respect to Legal Issues 5, 8, and 11, challenging Stevens County's enactment of Ordinance 2007-01, adopting Title 3 Development Regulations, in relationship to protections for critical areas within the jurisdiction of the GMA as required by RCW 36.70A.060 and 36.70A.172, because Stevens County Code (SCC) provisions 3.11 Subdivisions and 3.16 Short Subdivisions fail to address impervious surface and stormwater discharge.

1 6. SCC Provisions 3.11 Subdivision and 3.16 Short Subdivision are
2 remanded to Stevens County for the County to take legislative action to
3 achieve compliance with the Growth Management Act as set forth in
4 this Final Decision and Order no later than **February 3, 2009, 120**
5 **days** from the date issued. The following schedule for compliance,
6 briefing and hearing shall apply:

- 7 • The County shall file with the Board by **February 17, 2009, an**
8 **original and four copies** of a **Statement of Actions Taken to**
9 **Comply** (SATC) with the GMA, as interpreted and set forth in this
10 Order. The SATC shall attach copies of legislation enacted in order to
11 comply. The County shall simultaneously serve a copy of the SATC,
12 with attachments, on the parties. **By this same date, the County**
13 **shall file a "Remanded Index," listing the procedures and**
14 **materials considered in taking the remand action.**
- 15 • By no later than **March 3, 2009**¹⁵⁶, Petitioners shall file with the
16 Board an **original and four copies** of their Comments and legal
17 arguments (Petitioners' Compliance Brief) on the County's SATC.
18 Petitioners shall simultaneously serve a copy of their Comments and
19 legal arguments on the parties.
- 20 • By no later than **March 17, 2009**, the County shall file with the Board
21 an **original and four copies** of their Response to Comments and legal
22 arguments (Respondent's Compliance Brief.) The County shall
23 simultaneously serve a copy of such on the parties.
- 24 • By no later than **March 24, 2009**, Petitioners shall file with the Board
25 an **original and four copies** of their Reply to Comments and legal
26 arguments (Petitioners' Optional Compliance Reply Brief.) Petitioners
 shall serve a copy of their brief on the parties.
- The parties are requested to file their briefing electronically to the
 Board and opposing counsel on the date(s) indicated above in the
 compliance schedule along with the original and 4 copies two-hole
 center punched.

¹⁵⁶ March 3, 2009, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. See RCW 36.70A.330(2).

- 1 • Pursuant to RCW 36.70A.330(1) and WAC 242-02-891¹⁵⁷ the Board
2 hereby schedules a **telephonic Compliance Hearing for March 31,**
3 **2009, from 10:00 a.m. to 12:00 p.m. The compliance hearing**
4 **shall be limited to consideration of the Legal Issues found**
5 **noncompliant and remanded in this FDO.** The parties will call
6 **360-407-3780 followed by 808252 and the # sign.** Ports are
7 reserved for: **Ms. Wagenman and Mr. Scott.** If additional ports are
8 needed please contact the Board to make arrangements.

9 If the County takes legislative compliance actions prior to the date set forth in
10 this Order, it may file a motion with the Board requesting an adjustment to this
11 compliance schedule.

12 Pursuant to RCW 36.70A.300 this is a final order of the Board.

13 **Reconsideration:**

14 Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this
15 Order to file a petition for reconsideration. Petitions for reconsideration shall
16 follow the format set out in WAC 242-02-832. The original and four (4) copies of
17 the petition for reconsideration, together with any argument in support thereof,
18 should be filed by mailing, faxing or delivering the document directly to the
19 Board, with a copy to all other parties of record and their representatives. **Filing**
20 **means actual receipt of the document at the Board office.** RCW 34.05.010(6),
21 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite
22 for filing a petition for judicial review.

23 **Judicial Review:**

24 Any party aggrieved by a final decision of the Board may appeal the decision to
25 superior court as provided by RCW 36.70A.300(5). Proceedings for judicial
26 review may be instituted by filing a petition in superior court according to the
procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

Enforcement:

 The petition for judicial review of this Order shall be filed with the appropriate
court and served on the Board, the Office of the Attorney General, and all parties

¹⁵⁷ The Presiding Officer may issue an additional notice after receipt of the SATC to set the format and
additional procedures for the compliance hearing.

1 within thirty days after service of the final order, as provided in RCW 34.05.542.
2 Service on the Board may be accomplished in person or by mail. Service on the
3 Board means actual receipt of the document at the Board office within thirty
4 days after service of the final order.

4 **Service:**

5 This Order was served on you the day it was deposited in the United States mail.

6 RCW 34.05.010(19)

7 SO ORDERED this 6th day of October 2008.

8 EASTERN WASHINGTON GROWTH MANAGEMENT
9 HEARINGS BOARD

10 _____
11 Joyce Mulliken, Board Member

12 _____
13 John Roskelley, Board Member

14 _____
15 Raymond L. Paolella, Board Member